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GLOBAL HEALTH GOVERNANCE POST-COVID-19: TIME FOR A HIERARCHICAL ORDER?

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Abstract: *The COVID-19 has renovated the debate about global health governance. Many scholars have proposed that the World Health Organization (WHO) should assume the position of a central coordinator with hierarchical powers. This article presents four main objections to this project: the problems with 'one-size-fits-all' policies, the heterogeneous distribution of power within multilateral institutions, the risks of crowding out parallel initiatives, and the democratic principle. Testing the WHO's ability as a provider of technical information, an OLS regression, analyzing the first year of the coronavirus health crisis, from January 2020 to January 2021, in 37 countries reported in the World Values Survey Wave 7, shows a negative relationship between the population trust in the WHO and the number of cases of COVID-19. This indicates that there is a valid case for countries to strengthen the WHO's mandate, but not to create a hierarchical global health structure.*

Keywords: *Global Health Governance; World Health Organization; COVID-19; Hierarchy; Sovereignty*

INTRODUCTION

On 30 January 2020, the World Health Organization (WHO) declared the novel coronavirus an 'emergency of international concern' and on 11 March, elevated it to a pandemic. One year passed, as of 6 June 2021, 172.6 million cases and 3.72 million deaths caused by the COVID-19 have been reported worldwide (WHO 2021). For many scholars and scientists who have been studying the topic, the world's inability to prevent the spread of the disease did not come as a surprise. Moon and others, in an article published in 2017, pointed out that the world remained "grossly underprepared for outbreaks of infectious disease". According to their analysis, previous epidemics had shown that the global system for preventing, detecting, and responding to outbreaks was not reliable. The point may be that these earlier epidemics - Ebola, Zika, and yellow fever - were 'issues of concern to developing countries and maybe because of this fact did not drive great impetus to reforms in the global health system. The COVID-19, having hit hard the most powerful nations in the world, might be different. It may

trigger what political theorists call an 'opportunity window' - a rare opening to push solutions and produce major changes in the status quo (Kingdon 2011). In this case, the willingness to change directs towards a more comprehensive model of global governance.

Authors like Tanisha Fazal emphasize that when the novel coronavirus abated over the Western, countries turned to the WHO but did so overestimating the organization's role and capacity (Fazal 2020). In Moon's words, some seemed to think the WHO had leverage over the Chinese Government and could even conduct independent investigations within its territory to get information about the disease. However, the organization has no legal or political power to do so. Put differently, some seemed to believe that the world had at hand a hierarchical entity with wide powers to address health emergencies when all is available is 'a loose, flat network', a web of independent actors negotiating horizontally the norms that regulate their interactions.

This fragmented picture is a striking feature of the current global health governance. In this system, the WHO is not properly a directive coordinator, but one of the actors in an archipelago of players. Such 'unstructured plurality' leads Barry Bloom, dean of Harvard University's School of Public Health, to argue that "there's no architecture of global health" (Cohen 2006). Fidler (2007) prefers a metaphor that compares this structure to open-source software, which "becomes a public good produced and applied by a broad spectrum of people and institutions with diverse interests that improves the more it is used". As such, global health governance does not flow from organized and centrally implemented authority but from open-source anarchy in which governments and non-state actors operate.

In any case, now that the world may better understand the WHO's role in the global order, there has been a strong push for a more consolidated architecture; one that allows for coordinated global health governance to confront challenges like the COVID-19 pandemic. As posed by Gostin (2020a), the question then is what does it mean to strengthen global governance? For him, it means that States will have to "share their sovereignty" to craft a more robust global system, which keeps partially the multipolar architecture, but tailors a position of commandment for the WHO, solidifying its global mandate with powers to ensure greater compliance at the national level, and political backing to stand up to governments that defy its directives.

Nevertheless, there are grounds for concern about this process of hierarchization in global health governance. This article addresses these issues by introducing conditions under which countries may justifiably limit the influx of international policies in the health area. It also addresses political questions that can undermine the WHO legitimacy and shows why a departure from the current horizontally open architecture might not produce the best outcomes. There is a valid case for the WHO's operations to be strengthened post-COVID-19 but through knowledge and resource provision, not hierarchical coordination. In the following items,

this study will present a range of reasons why countries, in particular the developing ones, should eschew the temptation to create a hierarchical global health structure, which may not only fall short due to countries' asymmetries but is likely to create losers in the process.

CAVEATS FOR A WHO'S ENLARGED MANDATE

Global governance, as discerns Patrick (2014), is a "slippery term". If in the past it denoted a world government, today it refers to a more concrete idea: the network made up by governments, international organizations, and other non-state actors to address challenges that transcend national borders. This web has sharply expanded in recent years, coining multilateral bodies that are far more intrusive than the conventional international project (Zürn 2012). Yet, in the face of themes such as global warming, nuclear proliferation, money laundering, and pandemics, whose effects are indistinctly spread around the globe and resistant to the control of even the most powerful governments, many scholars believe that there is no transnational workable mechanism able to implement proper measures to ensure efficient outcomes (Nordhaus 2005). The novel coronavirus crises may underpin this conclusion. As Frenk and Moon (2013) argue, an arrangement robust enough to respond to the challenges posed by the agenda of repetitive infections and reproductive health problems demands reinforced health structures not only at the national but at the worldwide level - this is the rationale for a global health system.

Still, there are at least four major issues that need to be addressed before moving to a model of global health governance that entails, in practical terms, a more centralized and hierarchized management, namely: (1) The potential ineffectiveness of universalized policies when applied to places with a distinct set of characteristics without the necessary adjustments; (2) Legitimacy questions regarding geopolitical stances and the balance of power that surrounds multilateral institutions; (3) The possible crowding-out of parallel initiatives due to the hierarchization of the system; (4) Questions related to health often go beyond the WHO's scope, some of which may demand specific submission to the democratic principle, domestically.

Universal Policies: One Size Does Not Fit All

Since the beginning of the pandemic, the WHO has recommended that governments adopt strict rules of social distancing and reduced individual mobility (WHO 2021). Such measures are costly and sometimes of questionable efficacy, but whenever governments fail to curb the disease through early contact tracing, they are left with few options but to concede to them (Vicenti 2020). In this context, like Paul, Brown, and Ridde (2020) observe, following the WHO recommendations, and under

internal and international pressure, some governors have adopted a set of one-size-fits-all policies without performing their adapted risk assessment, which can be problematic. Far from downplaying the severity of the health crisis, but it makes little sense to transfer procedures applied for a country where the median age is forty-five to a country with a median age of twenty-five, given the mortality rate of COVID-19 is more than sixty times higher among those ages sixty-five or older (Yanez 2020). Before incorporating a 'copy and paste' mechanism, countries should consider their characteristics as nations, which may substantially affect the efficiency of 'imported' policies.

Peru is an illustrative example of how the lack of adjustment can lead universal policies to fail due to contextual determinants. In a piece in the New York Times, Taj and Kurmanaev (2020) affirmed that "President Martín Vizcarra followed the best advice when the coronavirus arrived in Peru". By that, they mean that he ordered one of Latin America's first and strictest lockdowns. "Yet instead of being lauded as a model of disease control, Peru has become one of the world's worst coronavirus hot spots" - when the article was written, in June of 2020, Peru had 219 new daily cases per million of population, the fourth biggest outbreak in the world (Roser 2021); currently the performance of the country is considered by the Lowi Institute the worst among 102 countries analyzed (Leng and Lemahieu 2021). Then the very article gives the possible reasons for the failure: Peruvians were asked to wash their hands and stay at home, but only one-third of the poor households have running water, they have little to no savings and, even though they were given some money, only half of the homes have a refrigerator, which forces families to return day-to-day to crowded markets, a major source of infection. The conclusion must be that whether the related social factors were not considered in the design and implementation of the policy, actually President Vizcarra did not receive, nor did he follow 'the best advice'.

In situations of strong common interest and need for high levels of social (international) cooperation, like a pandemic, the much necessary coordination comprehensively makes centralized command-and-control instruments much more attractive. However, this should not obscure the political common sense that the decision-making at the local level is normally more effective (Muller 2018) and that 'one-size-fits-all' policies usually fail (Mehtar 2020). The reason for that is straightforward: each society must adjust solutions to its particularities. For instance, cultures considered 'tight' (with strong norms), such as Singapore, Japan, and China may have more means to enforce sanitary measures than 'loose' cultures (with higher tolerance of deviant behavior), such as those of the United States, Italy, and Brazil (Gelfand, Harrington, and Jackson 2017). Moreover, North American and much of Western European cultures tend to positively value acts like kissing and hugging, a factor of interpersonal transmission of the virus, which is much less common in Asian cultures. Policies to be applied to these countries cannot be the same.

To counter-argue, one could say that strengthening the WHO's mandate does not mean that health policies will unavoidably become 'from top to bottom' or inflexible. However, historical experience shows that when international organizations have sufficient leverage to impose their 'ideal' solutions, they do so. The International Monetary Fund (IMF) is a vivid example of this: whether called to offer technical advice and financial assistance to liquidity crises, the IMF has used the opportunity to impose broad economic reforms, whose fit was at times highly controversial - in the 1990s, acting in Southeast Asia, the Fund tried to follow much of the same guidelines applied before in Latin America, Eastern Europe, and the former Soviet Union, even though the situation of the Asian countries was drastically different (Feldstein 1998). Nothing guarantees that the WHO will not follow the same path.

Legitimacy: The WHO Is Not a Political Island

The same theories of power and principal-agent theory that constraint international organizations to follow the commands of powerful states (Bauer 2007) apply to the WHO, which cannot be insulated from its political context. International organizations are rarely if ever neutral, but part of a complex web of qualified interests. Therefore, the risks associated with the WHO falling under the influence of member states will be potentialized in a hierarchical structure. This is aggravated by the existence of governments that do not share values like transparency and respect for individual rights (Raustiala 2016).

Regarding this last aspect, it is worth remembering that the WHO received great criticism, especially but not exclusively from the United States, for its early handling of the COVID-19 crisis, when it was accused to let itself be manipulated by the Chinese government, having understated the seriousness of the disease, conveyed misinformation provided by Chinese authorities, and praised China for its response to the outbreak (Fazal 2020) - the suspicion that an organization may be acting as a spokesperson for a country or, worse, as a venue for some governments to influence and control policies adopted in other nations is a critical aspect to undermine the organization's legitimacy in the international order.

Finally, the somehow old-fashioned division North-South is also an issue here, once developed countries still retain a great deal of control over the agenda and interior bureaucracy of the WHO (Chorev 2012). In this sense, even though most non-state actors are from the Northern portion of the globe as well, the anarchy of competing agents at least provides relative open access and facilitates that conflicting interests make the apparatus difficult to be controlled by one single entity. Thus, the current model might be more democratic than a 'lord-commander' with a formal mandate to hold a strong grip over global health governance.

Risks of Crowding-Out Parallel Initiatives

There are many reasons to complain about the current global health system. Paul, Brown, and Ridde, for example, call for a shift from a reactional archetype to a preventive model that adopts a holistic approach to tackle upstream causes and determinants of diseases, helping populations to reduce risk factors and augment their natural immunity (Paul, Brown, and Ridde 2020). Moon and colleagues do not deny this reactionary mode, but add that, inconsistently, the system lacks an emergency culture that allows for quick decisions. The final result may be a system that is not robust enough to deal with the threats of the present and the future. Nonetheless, it is important to notice that the fragility of the system is partially related to current WHO's institutional problems, such as the vulnerability to the pressure of member states, minimal transparency, and little accountability after failure (Moon 2017) which are not simple problems to solve and might be intensified with the augment of powers and financial resources.

To make matters worse, elevating the WHO's position may crowd out parallel initiatives that today are relevant in ameliorating the system, especially those headed by non-state actors like the Rockefeller and the Gates Foundation (Andreoni and Payne 2003), the latter with investments that outspend many governments (Dieleman 2006). As Fidler alerts, "the Gates Foundation will no more march to the tune of WHO than the United States will to the cadence of the UN" (Fidler 2007).

Of course, the consequences of non-state actors' preferences in terms of global health still need to be better understood. According to some positions, this multistakeholder governance might be a Trojan horse for the foundations of multilateralism (Sridhar and Woods, 2013), a strategy adopted by powerful states to neutralize the numerical advantage that developing nations have in the WHO, creating a plethora of organizations over which they exercise easier dominance (Moon forthcoming). As a counterargument, part of the informational role the WHO can exercise (a topic that will be further developed ahead) involves tapping into 'pet projects' of non-state actors and report which interest they are serving, such that countries and the international community can decide if they make sense in the context of a sound strategy for global health.

Risks to the Democratic Principle

According to a critic scholarship, globalization not only restrains the states' autonomy but also disables democracy by inflicting the convergence of national policies. Thus, the structural change in the very nature of sovereignty is an expected consequence of the transformation of the fundamental structures of international politics, from an anarchic architecture to a global governance system (Zürn 2012).

Put differently, in domestic politics, governance is straightforward, once exercised by a government vested with formal authority to define and enforce binding rules. The international domain, conversely, is composed of independent sovereign entities that recognize no superior authority (Patrick 2014). Global governance brings ambiguity to this dichotomy. Specifically, in the present case, the tension between international order and domestic democracies arises because the consequences of health policies can be enduring and countries might have to deal with the side-effects of measures imposed by multilateral organizations. For example, the WHO does have a scientific basis to advise for lockdowns - which it would secure more energetically if had the powers thereof - once researchers have affirmed that "only strict quarantine measures can curb the coronavirus disease" (Sjödin *et al.* 2020). However, countries individually must assess adverse effects (Wang 2020), such as depression, anxiety, stress, and even suicides (Sher 2020), according to the underlying conditions of their populations. Also, at some point, if the lockdowns are not strictly necessary, nations should be able to opt for less extreme measures to avoid the general deterioration in population mental health (Pierce *et al.* 2020) - as a social species, humans are negatively affected by isolation and loneliness, hypervigilance, and feelings of vulnerability, which are associated with increased morbidity and mortality (Hawkey and Cacioppo 2010), effects that may last long after the pandemic and the lockdowns have passed. This argument now may seem unreasonable, considering the extensive academic support for strong mitigating measures against the COVID-19, a disease that has spread across the entire globe. The evaluation could be quite different if the spread of the disease was limited to developing countries and the WHO was setting tough measures, with extraordinary socioeconomic impacts, to contain the virus and prevent it to hit other (developed) nations. Granting to the WHO the power to fight pandemics with the necessary measures to be effective can have several unintended effects plus some that are foreseeable - it would relativize national democracies, especially in countries with reduced international leverage (mostly in the global South), in extreme cases deactivating the right of peoples to make their own choices about serious and controversial matters. Lastly, countries have other interests to balance beyond the WHO's scope, even during a health crisis. From an economic and political perspective, for instance, responding successfully to a pandemic has to mean complementary things that involve not only direct impacts (reducing the spread of the virus and the number of deaths) but also dealing with social and economic consequences (Roser 2021). Illustratively, a response that brings increasing rates of poverty and higher mortality from other causes, often associated with economic determinants (Cockerham, Hamby and Oates 2017), disproportionally affecting the poorer (Fothergill and Peek 2004), cannot be considered successful. All these further problems are not part of the WHO sphere and may not be assessed properly in the design provided by well-intentioned 'ideal' international policies.

WHAT IS THE WAY FORWARD?

If a hierarchical global health system presents unintended consequences and predicted risks, unilateralism is far from being the solution. It is hard to imagine that a country, acting alone, would be able to respond effectively to health threats like the COVID-19 in a globalized world. While island states like New Zealand and Cuba can control their borders with increased efficacy, most countries are not islands to secure mitigation successes through isolationism (Fazal 2020). Additionally, misrepresenting caution in terms of embracing policies drawn abroad with unreceptiveness or unjustified skepticism can have disastrous outcomes.

Brazil may be included in this last reactionary category: if the Peruvian authorities rushed to emulate policies applied abroad with little or no adjustment, the Brazilian federal government refused any advice from the international community. (Watson 2020) The administration has never adopted explicitly the Sweden light-touch style (McLaughlin 2020), but also did not embrace the WHO's guidance (Ferigato *et al.* 2020). Under the federal government's erratic behavior, subnational powers had to undertake most measures against the pandemic. However, the lack of coordination in implementing coherent policies may partially explain why the country became the world's worst COVID-19 hot spot as of March 2021 (Roser 2020). A report from the University of Oxford showed that by June 2020, testing in Brazil was infrequent, and staying at home for a full fortnight was exceptional, in both cases even among potentially infected people. And although the WHO's recommendations were not being met, at that time many subnational governments were already starting to relax social distancing rules (Petherick *et al.* 2020).

The contradiction arising from the comparison between the opposite actions of the Peruvian and Brazilian governments, which led both countries to similar calamitous outcomes - (Brazil with 59.2 thousand cases per million people and Peru with 46.5 thousand as of March 30, 2021) (Roser 2021) - may be the key to solve this riddle. The COVID-19 crisis has cast light on the necessary equilibrium between international and domestic orders. States, then, are called to work on this symmetry and build a governance landscape that recognizes health as a global issue (Gostin 2020b) but that strengthens systems at the local level, such that nations can tailor the best policies, according to their specificities, to answer to their populations' choices and needs (Paul, Brown and Ridde 2020).

It is fair to say that a more robust hierarchized system could potentially offer enhanced standards for preventing, detecting, and responding to infectious disease outbreaks - it has a higher ceiling under perfect conditions. Yet, conditions are never perfect and, besides the grounded skepticism on the efficacy of 'universal' solutions for problems embedded in local circumstances; other values are at stake, including the right of peoples to self-determination, democracy, and equity. As an illustration, the Institute

Lowy classified political systems as democratic and authoritarian and found that on average the latter performed better at containing the spread of COVID-19 (Leng and Lemahieu 2021) - it is assumed that few academics would support increasing authoritarianism to reach effectiveness at managing health crises. At the same time, it might be easy for developed states to promote a hierarchical global order knowing they will be able to make the most of it - the dangers for their sovereignty and ambitions are significantly smaller. However, developing countries are unlikely to receive the same package of costs and benefits.

Drawing these elements together, nation-states should not 'share their sovereignty' with the WHO. Governments have a responsibility to be a cushion between international policies and the domestic order. In Zürn's (2012) reflection, "higher levels of economic openness increase the demand for policies to buffer the less desirable effects of world market integration". Similarly, higher levels of multilateralism demand national governments to filter the less desirable effects of international integration. This conclusion applies to a wide range of situations, from foreign aid and investment (with possible imperialist hidden purposes) to health-driven intervention and crisis management.

Thus, if the question for the future, as Moon and others perceive, is whether the WHO will be mandated and if states will bestow it with greater hierarchical authority, we hope the answer is, at least in part, negative. Despite the criticism on the fact that the WHO's main function today is not as a directing authority, but as an advisor (Moon forthcoming), it is possible to adopt a more positive interpretation of this conjuncture and advocate exactly for the strengthening of the knowledge-based function. As a fruit of specialization, the WHO possesses singular expertise to provide decisive consultancy and support (Hawkley and Cacioppo 2010) in the health area, whose beneficial effects should not be underestimated.

Borrowing the concepts and interpretation by Ravallion, a knowledge institution can serve as a broker that recruits existing knowledge and conveys it to the needy recipients. It can also identify pressing knowledge gaps and sensitive areas of ignorance, then producing information to address such flaws. It might seem too little, but the information in the context of global health, besides its direct effects and positive externalities, can help solve coordination failures stemming from complementarities in the decisions and actions of nation-states. A well-functioning global institution, which can be the WHO, properly structured to solve deficiencies arising from decentralized and fragmented sources of information, can generate economies of scale in knowledge development and reduce free-rider problems. This context is auspicious to produce efficient coordination and incites broader cooperation (Ravallion 2016).

Understandably, the current model may sometimes be seen as miscellanea, but as Boettke (2021) emphasizes, the difference between bureaucratic and democratic administrations is that democracy pushes the decision increasingly down to overlapping

competing jurisdictions, while bureaucracy relies mostly on experts immune from people's engagement. Democratic models are by nature messy but responsive to the citizenry. Bureaucracy administration is technical, but when the monopolist expert makes an error, there is no mechanism for correction because the decision is from top to bottom. And this is not a rebellion against experts. They are critically important to the problem-solving process, insofar as within a democratic framework, in which people can govern themselves guided by the information they provide. This system does not require submission and outsourcing of the decision-making; it informs and qualifies the process.

Against this background, a way forward is to center the WHO's mandate in developing worldwide mechanisms to make information available and accountability possible, by generating and spreading trustworthy knowledge at the global, country, and regional levels. In this framework, analytical tools and other simple measures could promptly enhance the system, such as: (a) an integrated platform for exchanging epidemiological data between governments (Moon 2017); (b) investment in easing data collection and transparency, making public the main threats countries face and pose; (c) an accredited index of pathogeneses and other risk factors; (d) a catalog of specificities of the populations' habits and immunity, as well as relevant constraints to plans of action. These and other complementary initiatives (e.g. financial mechanisms to incentivize countries to report outbreaks rapidly and political instruments within the United Nations to hold them accountable in case of delay) would allow for a more holistic and preventive approach, which, aligned with technical support and the supply of public goods across borders, will result in better coordination and cooperation, with political costs and risks infinitely lower than a radical hierarchization of the global system.

Are these improvements enough to deal with threats of the magnitude of the novel coronavirus? Critics of the current system will probably say they are far from sufficient to equip the WHO for such challenges. Indeed, foreseeing the future is always a controversial business. In any case, a straightforward way to estimate what might happen tomorrow is to look at what happened yesterday. In the last part of this piece, a statistical analysis evaluates how, on average, performed countries during the first year of the COVID-19 pandemic, according to the levels of trust in the WHO, with which it is possible to discuss the WHO's role as a provider of dependable, but not binding, information.

TESTING THE ARGUMENT

If the WHO can play a significant role as a provider of relevant information, and this is enough to make an impact in the response against the virus, then countries where the levels of trust in the WHO are high should typically perform better. To test this hypothesis, we estimate the association between the number of cases of COVID-19 (per million people) and the reported popular trust in the WHO in 37 countries - the nations that had information about this parameter¹ in the World Values Survey Wave 7 (2017-2020) (Haerpfer *et al.* 2020). All data that has no other source specifically assigned was collected from 'Our World in Data' (Roser 2021). The number of cases per country considered the period from the beginning of the pandemic up to January 12, 2021 - before the start of the vaccinations, which is one more criterion (a decisive one) to differentiate countries and lead to complex results.

There is no metric to directly state the level of information a country received from the WHO and how it was relevant to drive decisions in the context of the COVID-19 pandemic. To overcome this hurdle, this piece assumes that the popular trust in the WHO can serve as a proxy for the level of the organization's proximity and how its recommendations are circulating in a country. On average, countries where the population presents higher levels of trust in the WHO will be the ones where the organization has greater penetration and conceivable influence. Conversely, to say that policymakers will follow the WHO's guidance in such cases would be an extrapolation, which makes the metric a suitable middle ground to test not the compliance with the WHO's policies, but the informational dimension. Therefore, aware of a series of variations over time and across countries that can impact individual cases, this method still allows for the inferences within the restrained scope of the study, once when individual countries are compared with the overall results, it is possible to assert that there is no distortion in the findings.

To prevent omitted factors, control variables were included after the first estimation. *Model 2* inserts Human Development Index (HDI) and Gini to control for economic and socioeconomic variations across countries, which could lead states with similar policies to different results. *Model 3* includes the percent of the population aged 65 and above (Aged Pop) and population density (Pop Density), two parameters that are considered important to the effects and spread of the disease (Rocklöv and Sjödin 2020) and the number of cases effectively reported (Sjödin *et al.* 2020). *Model 4* controls for government stringency,² according to the Oxford COVID-19 Government Response

¹ Egypt, Hong Kong, Kazakhstan, Kyrgyzstan, Lebanon, Macau, Puerto Rico, and Taiwan were excluded due to the lack of data in the additional variables described ahead.

² The index sets value between 0 and 100 for each country, considering ten metrics: school closures, workplace closures, cancellation of public events, and restrictions on public gatherings, closures of public transport, stay-at-

Tracker (Hale *et al.* 2021), and tests for coronavirus per thousand of population, such that differences between countries with high and low trust in the WHO can be seen even when compared with countries that adopted similar degrees of strictness. Finally, *Model 5* adds trust in science (Science) and obedience to the rules (Compliance),³ to ensure that the coefficient on trust in the WHO is not overestimated by the absence of such elements of human capital.

The basic 'Ordinary Least Squares' (OLS) in the more complete step takes the following form, where the dependent variable *Cases of COVID-19* is the outcome, β_i indicates the coefficients for the constant and explanatory independent variable, π_i stands for the overall control variables, γ_i represent the two human capital control variables, and ε is the standard error:

Cases COVID19

$$\begin{aligned} &= \beta_0 + \beta_1 \text{TrustWHO}_i + \pi_1 \text{HDI}_i + \pi_2 \text{Gini}_i + \pi_3 \text{AgedPop}_i \\ &+ \pi_4 \text{PopDensity}_i + \pi_5 \text{Stringency}_i + \pi_6 \text{Tests}_i \\ &+ \gamma_1 \text{TrustScience}_i + \gamma_2 \text{Compliance}_i + \varepsilon \end{aligned}$$

It needs to be stressed that the purpose of this analysis is not to estimate the effects of the WHO recommendations on the performance of countries that followed its guidelines, which would be in some degree contradictory with the argument that following the guidance without temperaments may lead to harmful outcomes. The underlying hypothesis is that shared resources plus timely, relevant and reliable information, once received and adjusted by each country to tailor its policies or *incorporated by the population itself* (to some degree, people can follow the WHO's guidance regardless of government actions), is a critical aspect in the answer to health emergencies and should spark higher levels of spontaneous coordination. As a result, better overall performance is expected in comparison to a context of fragmented or inexistent information and a lack of instrumented cooperation. It might be a strong assumption, but it is a reasonable one, which simplifies the analysis and avoids the endeavor to evaluate country by country - in each dimension of the proposed policies over time - something extremely complex and subject to multiple measurement errors.

home requirements, face covering, public information campaigns, restrictions on internal movements, and international travel control.

³Trust in Science: average answer per country when respondents were asked how much they agree with the statement that "Science and technology are making our lives healthier, easier, and more comfortable" — 1 meant "completely disagree" and 10 "completely agree" (Question 158); Obedience to the rules: mean answer per country when respondents were asked how essential it is, as a characteristic of democracy, that "people obey their rulers"— 1 meant "not at all an essential characteristic of democracy" and 10 meant it definitely is "an essential characteristic of democracy" (Question 248). Source: World Values Survey Wave 7 (2017-2020).

Table 1 reports the correlations and robust standard errors of the regression of the dependent variable (Cases of COVID-19 per million people in a country) on the mentioned independent variables, by steps.

Table 1: Results of OLS Regressions

	(1)	(2)	(3)	(4)	(5)
Trust WHO	-609.261*** (119.306)	-514.188*** (127.552)	-499.154*** (130.313)	-416.305*** (113.174)	-454.666*** (113.733)
HDI		40565.679 (20856.591)	21732.210 (36437.121)	-1.24e+04 (28150.790)	-2269.826 (30181.750)
Gini		461.788 (301.720)	501.259 (282.398)	576.932 (306.605)	912.781* (342.450)
Aged Pop			324.260 (449.420)	877.401* (401.721)	929.673* (400.740)
Pop Density			-5.329 (7.630)	-4.710 (4.230)	-8.007 (4.429)
Stringency				524.842** (145.697)	561.233** (155.209)
Tests				22.770 (11.928)	21.266 (10.397)
Science					7694.414* (2830.062)
Compliance					-363.508 (1980.095)
<i>N</i>	37	37	37	37	37
<i>R</i> ²	0.374	0.473	0.484	0.670	0.710

Note: Robust standard errors in parentheses

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

In all models, trust in the WHO had a negative association with the number of cases of COVID-19. And despite the inclusion of the control variables - potential factors that could be hidden in the error term, in that case making the estimation biased - the coefficient kept its strength with statistical significance at any alpha level. Being a level-level model, but considering that 'Trust WHO' is reported in a percent scale, each percentage point increase in the trust in the WHO in a country was associated with a

decrease, on average, of 455 cases of COVID-19 per million people, all else equal ($\beta = -454.666$; Robust SE 113.7331; $P = 0.000$; 95%CI = -688.0271, -221.3049; $R^2 = 0.7104$; $F = 11.18$). This negative correlation is depicted in Figure 1, perhaps underpinning empirically the WHO's ability to develop and disseminate useful knowledge.



Figure 1: Trust in the WHO and Case of Coronavirus (Feb/2020 - Jan/2021)

An interesting aspect of the graph above is that the observation for the United States, the highlighted dot in the upper center of the graph, presents a high positive residual that is; the United States (US) performs much worse than the model predicted according to the popular level of trust in the WHO in the country. With no intention to assert causality, it is worth remembering that the Trump administration withdrew from the WHO amid the crisis (Gostin 2020b), which may help understand the background of this abnormal result - in terms of deviance from the prediction.

From a data analysis perspective, the regression seems to confirm that the popular trust in the WHO is a good proxy for countries' access to information and guidance - the US being an outlier - and suggests that countries that are likely to be more closely tied to the global health network (again, assumed by the higher level of popular trust in the WHO) performed better in the first year of the pandemic, precisely when information was more critical due to the elevated degree of uncertainty regarding all the aspects of the pandemic. The R-squared value of 0.7104 reveals a good model fit. In other words, the independent variables explain 71.04 percent of the variation observed in the dependent variable - the number of cases of COVID-19.

There is not a threshold that determines automatically when a regression is good enough, but data from observational studies, such as the present, might be taken as evidence of a useful regression when the R-squared is at least 30 percent (Veaux, Velleman and Bock 2020).

A question that arises is whether this finding is not persuasive to grant the WHO the authority it needs to exert a more directive role in global governance. For the WHO does not have the power to sanction states for reporting failures, China lagged to report SARS; Saudi Arabia to report MERS; Sierra Leone, Liberia, and Guinea were slow to report Ebola (Fazal 2020). Even though most nations benefit from it, the dynamics of open-source anarchy allow states and non-state actors to resist international rules and pose risks to the whole global community. In this train of thought, with more powers, the WHO could perform even better.

Numbers, however, need to be complemented by interpretation to become meaningful (Muller 2018). In the present case, the qualitative analysis introduced in earlier items shows that despite the essential role the WHO plays in the global health governance, which can be improved, a shift towards hierarchization may not augment its positive side (Figure 1), but could yet increase substantially the number of occurrences like the Peruvian. The argument for knowledge-based coordination, providing the WHO the ability to allocate resources and inform decisions, but with no hierarchical power, rejects at the same time unilateralism and forced convergence.

This conjuncture can be also framed within the Pareto efficiency criterion. If the WHO is equipped to perform well in its role of supporting countries by delivering resources and high levels of reliable and relevant information before and during crises, all parties involved benefit. It is a Pareto improvement because it enhances global health governance without making non-state actors and developing countries worse off (Weimer and Vining 2017). New hierarchical global health governance, in its turn, would alter the existing distribution of costs and benefits, in the best case increasing total welfare, but potentially hitting non-state initiatives and producing losses to developing countries. In this scheme, powerful developed states would likely be in the winner group, while developing countries should naturally be clustered among the losers, which cannot be considered a Pareto improvement - one could say that this is how rich countries find a way to protect themselves against the diseases that come from poor and/or 'exotic' parts of the world.

CONCLUSION

There are great political stakes in asserting and, if the case, defining the equilibrium between domestic and international orders, a question that comes to light and seems particularly relevant in the face of a global disease outbreak, but that extends far beyond the health area. The optimal point of international integration raises

questions in topics like sovereignty, global security, socioeconomic inequality across countries, and the right and duty to humanitarian intervention, just to mention a few. Striking a balance between respecting the countries self-determination but, at the same time, protecting the interests of the international community is a continuing challenge.

The debate galvanized by the spread of the novel coronavirus is representative of this scenario. Many well-intentioned scholars have proposed a more neat and hierarchical global health governance, establishing the WHO as a de jure and de facto director of the system. Even though some of the formulations are somewhat cryptic, by reading between the lines it is possible to assert that the intention is to create an architecture able to bend national states when necessary. This article raises four key points that may (or should) prevent this change to happen.

First, the system would be propitious to the imposition of universal policies (one-size-fits-all), with results on the ground that are historically irregular, to say the least. Second, powerful governments politicize multilateral institutions, many of which are vulnerable to political influence. There is no reason to believe that the WHO will be different. Therefore, the intended centralization tends to not be a Pareto improvement, because it will create winners and losers, with developing countries at risk of paying the price of the reform. Third, a more centralized model of global health governance may crowd out important initiatives that today are accomplished by non-state actors. And fourth, the hierarchization of the system may disregard democracies and the fact that, to some extent, the WHO is unidimensional, while governments are multidimensional - they need to decide based not only on immediate health concerns, but considering a myriad of factors, both in the short and long run. One of the duties of government in a globalized world is to be a cushion between its people and global policies that may not be of interest or appropriate to the country's specificities.

This broad criticism does not mean that there are no good arguments for the impetus to change the existing model - the academic concerns are legitimate and the current system does provide fodder for controversies. In sum, the concerns and the call for reform are correct. The solution proposed is deemed to be wrong. Following Pisani-Ferry's (2018) advice, countries should not invest their hopes in audacious schemes of cooperation that may be inefficient. The way forward is to design a sufficient multilateral basis for flexible arrangements and to equip policymakers with a toolkit for decision-making on a field-by-field basis. In this sense, as a knowledge and resources provider, the WHO can work in close consultation with national authorities, not as superior, helping them to identify the main problems the country faces and what could be the best solutions. If the point is to improve the WHO's operational capacity and its ability to issue technical guidance and coordinate with countries, then there is still room for strengthening the organization's mandate. But knowledge must drive its role, not hierarchical power. 🌐

REFERENCES

1. Andreoni J & Payne AA. 2003. Do Government Grants to Private Charities Crowd Out Giving or Fund-raising? *American Economic Review*, 93(3): 792-812. DOI: 10.1257/000282803322157098.
2. Bauer S. 2007. Darren G. Hawkins, David A. Lake, Daniel L. Nielson, and Michael J. Tierney (Eds.): *Delegation and Agency in International Organizations*: (Cambridge University Press, 2006), "The Review of International Organizations 2, no. 3 (August 21, 2007): 305-7, <https://doi.org/10.1007/s11558-007-9025-y>.
3. Boettke P. 2021. *The Struggle for a Better World*. Mercatus Center, Washington.
4. Chorev N. 2012. *The World Health Organization between North and South*. Cornell University Press, Ithaca.
5. Cockerham WC, Hamby BW & Oates GR. 2017. The Social Determinants of Chronic Disease. *Am J Prev Med* 52, no. 1S1. <https://dx.doi.org/10.1016%2Fj.amepre.2016.09.010>.
6. Cohen J. 2006. The New World of Global Health. *Science*, 311, no. 5758, 162-167. DOI: 10.1126/science.311.5758.162.
7. Dieleman JL. 2006. Development assistance for health: past trends, associations, and the future of international financial flows for health. *Lancet* 387(10037): 2536-2544. DOI: 10.1126/science.311.5758.162.
8. Fazal T. 2020. "Health Diplomacy in Pandemical Times," *International Organization* 74(S1): E78-E97. doi:10.1017/S0020818320000326.
9. Feldstein M. 1998. Refocusing the IMF. *Foreign Affairs* 77(2). Accessed on 20 April 2021. <https://www.foreignaffairs.com/articles/asia/1998-03-01/refocusing-imf>.
10. Ferigato S et al. 2020. The Brazilian Government's mistakes in responding to the COVID-19 pandemic, *The Lancet* 396 (10263): 1636. [https://doi.org/10.1016/S0140-6736\(20\)32164-4](https://doi.org/10.1016/S0140-6736(20)32164-4).
11. Fidler DP. 2007. Architecture amidst Anarchy: Global Health's Quest for Governance. *Indiana University, Articles by Maurer Faculty* 329. <https://www.repository.law.indiana.edu/facpub/329>.
12. Fothergill A & Peek LA. 2004. Poverty and Disasters in the United States: A Review of Recent Sociological Findings. *Natural Hazards* 32. <https://doi.org/10.1023/B:NHAZ.0000026792.76181.d9>.
13. Frenk J. and Moon S. 2013. Governance Challenges in Global Health. *New England Journal of Medicine* 368: 936-942. DOI: 10.1056/NEJMr1109339.
14. Gelfand MJ, Harrington JR, & Jackson JC. 2017. The Strength of Social Norms Across Human Groups. *Perspect PsycholSci* 12(5). Doi: 10.1177/1745691617708631.
15. Gostin LO et al. 2020a. Reimagining Public Health section. *AJPH* 110 (11), 1605-1623. <https://doi.org/10.2105/AJPH.2020.305861>.

16. Gostin LO et. al. 2020b. US withdrawal from WHO is unlawful and threatens global and US health and security," *The Lancet*, Comment 396(10247): 293-295. doi: 10.1016/S0140-6736(20)31527-0.
17. Haerpfer C et al. 2020. World Values Survey: Round Seven. JD Systems Institute & WWSA Secretariat, Madrid, Spain & Vienna, Austria. doi.org/10.14281/18241.1.
18. Hale T et al., "Coronavirus Government Response Tracker", University of Oxford, January 7, 2021. <https://www.bsg.ox.ac.uk/research/research-projects/coronavirus-government-response-tracker#data>.
19. Hawkley LC & Cacioppo JT. 2010. Loneliness Matters: A Theoretical and Empirical Review of Consequences and Mechanisms. *Annals of Behavioral Medicine* 40(2). doi: 10.1007/s12160-010-9210-8.
20. Kingdon J. 2011. Agendas, Alternatives, and Public Policies. Longman, New York.
21. Leng A & Lemahieu H. 2021. Covid Performance Index: deconstructing pandemic responses. *Lowy Institute*, Access on 13 March 2021. <https://interactives.lowyinstitute.org/features/covid-performance/>.
22. McLaughlin M. 2020. Coronavirus in Scotland: We must learn from Sweden's light-touch approach, Sturgeon adviser says, *The Times*, September 28, 2020. <https://www.thetimes.co.uk/article/coronavirus-in-scotland-we-must-learn-from-swedens-light-touch-approach-sturgeon-adviser-says-fft2f6dm6>.
23. Mehtar S et al. 2020. Limiting the spread of COVID-19 in Africa: one size mitigation strategies do not fit all countries. *Global Health* 8, no. 7. [https://doi.org/10.1016/S2214-109X\(20\)30212-6](https://doi.org/10.1016/S2214-109X(20)30212-6).
24. Moon S et al. 2017. Post-Ebola reforms: ample analysis, inadequate action. *BMJ* 356:j280. doi: 10.1136/bmj.j280.
25. Moon S. Forthcoming. The Past, Present, and Future of Global Health Governance. In Barnett, Pevehouse, and Raustiala.
26. Muller JZ. 2018. The Tyranny of Metrics. Princeton University Press, Princeton.
27. Nordhaus L. 2005. Paul Samuelson and Global Public Goods. *Yale University*. <http://www.econ.yale.edu/~nordhaus/homepage/homepage/PASandGPG.pdf>.
28. Patrick S. (2014). The Unruled World: The Case for Good Enough Global Governance," *Foreign Affairs* 93(1): 58–73. <https://www.foreignaffairs.com/articles/2013-12-06/unruled-world>.
29. Paul E, Brown GW, & Ridde V. 2020. COVID-19: time for a paradigm shift in the nexus between local, national, and global health, *BMJ Global Health*, 5:e002622. doi:10.1136/bmjgh-2020-002622.
30. Petherick A et al. 2020. Do Brazil's COVID-19 government response measures meet the WHO's criteria for policy easing?" *BSG Working Paper Series*, University of Oxford. <https://www.bsg.ox.ac.uk/research/publications/do-brazils-covid-19-government-response-measures-meet-whos-criteria-policy>.

31. Pierce M et al. 2020. Mental health before and during the COVID-19 pandemic: a longitudinal probability sample survey of the UK population, *Lancet Psychiatry* 7. [https://doi.org/10.1016/S2215-0366\(20\)30308-4](https://doi.org/10.1016/S2215-0366(20)30308-4).
32. Pisani-Ferry J. 2018. Should We Give up on Global Governance? *Bruegel* 17. <https://bruegel.org/wp-content/uploads/2018/10/PC-17-2018.pdf>.
33. Raustiala K. 2016. Governing the Internet, *The American Journal of International Law* 110, (3): 491-503. <http://www.jstor.org/stable/10.5305/amerjintelaw.110.3.0491>.
34. Ravallion M. 2016. The World Bank: Why It Is Still Needed and Why It Still Disappoints," *Journal of Economic Perspectives* 30 (1): 77–94. DOI: 10.1257/jep.30.1.77.
35. Rocklöv J & Sjödin H. 2020. High population densities catalyse the spread of COVID-19", *Journal of Travel Medicine* 27 (3). <https://doi.org/10.1093/jtm/taaa038>.
36. Roser M et al. 2021. Coronavirus Pandemic (COVID-19), *Our World in Data*, Access on March 29, 2021. <https://ourworldindata.org/coronavirus>.
37. Sher L. 2020. The impact of the COVID-19 pandemic on suicide rates. *QJM: An International Journal of Medicine* 113 (10): 707-12. <https://doi.org/10.1093/qjmed/hcaa202>.
38. Sjödin H et al. 2020. Only strict quarantine measures can curb the coronavirus disease (COVID-19) outbreak in Italy, 2020", *Eurosurveillance* 25 (13). <https://www.eurosurveillance.org/content/10.2807/1560-7917.ES.2020.25.13.2000280>.
39. Sridhar D & Woods N. 2013. Trojan Multilateralism: Global Cooperation in Health. *Global Policy* 4(4), Wiley Online Library: 325-335. <https://doi.org/10.1111/1758-5899.12066>.
40. Taj M and Kurmanaev A. 12 June 2020. Virus Exposes Weak Links in Peru's Success Story The New York Times. <https://www.nytimes.com/2020/06/12/world/americas/coronavirus-peru-inequality-corruption.html>.
41. Veaux RD, Velleman PF, & Bock DE. 2020. *Stats: Data and Models* Pearson, Hoboken.
42. Vicenti M et al. 2020. Lockdown timing and efficacy in controlling COVID-19 using mobile phone tracking. *The Lancet, EClinicalMedicine* 25. <https://dx.doi.org/10.1016%2Fj.eclinm.2020.100457>.
43. Wang C et al. 2020. Immediate Psychological Responses and Associated Factors during the Initial Stage of the 2019 Coronavirus Disease (COVID-19) Epidemic among the General Population in China, *Int. J. Environ. Res. Public Health* 17 (5): 1729. doi: 10.3390/ijerph17051729.

44. Watson K. 2020. Coronavirus: Brazil's Bolsonaro in denial and out on a limb. *BBC News*, Access on 20 April 2021. <https://www.bbc.com/news/world-latin-america-52080830>.
45. Weimer DL & Vining AR. 2017. *Policy Analysis: Concepts and Practice*. Routledge, Taylor & Francis Group, New York.
46. World Health Organization - WHO. 2020. Strategic preparedness and response plan. Accessed on 15 April 2021. <https://www.who.int/publications/i/item/strategic-preparedness-and-response-plan-for-the-new-coronavirus>.
47. World Health Organization - WHO. 2021. WHO Coronavirus (COVID-19) Dashboard. Accessed on 6 June 2021. <https://covid19.who.int>.
48. Yanez D. 2020. COVID-19 mortality risk for older men and women", *BMC Public Health* 20(1742). <https://doi.org/10.1186/s12889-020-09826-8>.
49. Zürn M. 2012. Globalization and Global Governance, in *Handbook of International Relations*, Oxford University Press, Oxford.



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THE SECURITY CHALLENGES OF EUROPEAN DEMOGRAPHICS AND POLITICS CAUSED BY THE MODERN MIGRATION CRISIS

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Abstract: *The paper aims to analyze the ongoing situation in the European Union member countries caused by modern migration flows. It shows the real impact of refugees and migrants on European demography. It describes the future scenarios of global demographic and social challenges, which lead to the socio-economic and political crisis, and the failure of European political elites. The study mainly is based on the following research methods: descriptive, statistical, and analysis. The basis of the source represents the books, scientific articles, empirical and press materials, documents published on official websites in the field of migration policy. The essence of the modern migration in Europe became very acute since the current migrants are mostly followers of Islam, which in all its aspects and completeness is currently one of the most urgent topics, and draws the special attention of political circles and international clubs. Muslims in Europe are, first, immigrants whose influx into the European continent has seriously changed its demographic picture and political situation. In this regard, it should be said that the growing number of Muslims in Europe is causing certain demographic challenges that significantly affect the European socio-cultural situation, and lead to the financial and political crisis.*

Keywords: *Islam; Europe; Migration; Demography; Security*

INTRODUCTION

Several periods can be distinguished in the modern history of migration flows to Europe. First, at the beginning of the twentieth century, after the First World War, however the influx of Muslim immigrants was very small. The second phase can be considered the period after the Second World War, because of post-colonial development: many European countries urgently needed cheap labor resources to restore the post-war economy. The thirds period began at the beginning 90s as soon as the Soviet Empire was dissolved. The last and most important period of modern migration can be considered after the Arab spring and continues up today, which shapes a new picture of modern Europe. There is practically not a single EU country that

has not been affected by the migration crisis. To the greatest extent, the consequences of the influx of migrants are experienced by such bordering countries of the European Union as Greece, Bulgaria, Hungary, as well as the leading countries of the community - Germany, France, and Great Britain, several Scandinavian countries where the level of social benefits is quite high and there are large Muslim communities. As the International Organization for Migration (IOM) has recorded, the total number of migrants may rise significantly. In this regard, it is legitimate to state that the European crisis is part of the global migration crisis and only the tip of the iceberg that may fall in Europe soon. The European Union, in the opinion of both domestic and foreign analysts, experiences very tough times, which is manifested in the invasion of Europe by newcomers having different from European values. Here the situation is worsened by the fact that many of them are religious fanatics and do not accept the European culture and values. The adherents of the 'Islamic State' who penetrate the EU countries under the guise of refugees and proclaim their main goal to fight against all, who do not follow their radical ideology, in this regard pose a special danger. This development of events is already happening on the territory of several European countries. At the same time, the political elites of European states failed to cope with such a complicated situation, and are unlikely to take active and proper actions against migrants, because any of their actions will generate a sharp response from migrants. Moreover, the multiple numbers of migrants from the Islamic countries lead Europe not only to the economic and political crisis but to the demographic collapse as well.

MODERN MIGRATION TRENDS IN EUROPE

Several periods can be distinguished in the modern history of migration flows to Europe. First, at the beginning of the twentieth century, after the First World War, however the influx of Muslim immigrants was very small. The second flow can be considered the period after the Second World War, because of post-colonial development. Since many European countries urgently needed cheap labor to restore the post-war economy, their governments stimulated the influx of foreign workers from other countries. The next period began in the late 80s, however, it was not as acute as the next one. A new and the most acute stream poured into Europe after the Arab spring turning migration into the central social problem of our time. Here we have to highlight that the influx of immigrants has increased especially in connection with the recent events in northern Africa and the Middle East. Immigrants strive to get to countries with the best standard of living, which means that in this regards the most share of migrants come to the fate of such economically prosperous states as Germany, Great Britain, France, Belgium, and the Netherlands. Thus, the number of Muslim migrants is growing here and in the whole of Europe causing certain demographic challenges that significantly affect the European socio-cultural image. In this regard, it is

worth to the statistics of recent 3 years and compares the situation. Thus, in 2017, the countries of the European Union had 4.4 million migrants. Nevertheless, these estimated data do not give a clear picture of the migration surges to the European Union as they also include the dynamic trends of movement of people between the EU Member States (Hackett 2017). It worth pointing out that in the same year - 2017 the most hospitable place for migrants appears Malta there was recorded 46 immigrants per 1000 persons, the second place was Luxembourg with 41 immigrants per 1000 persons (Migration and Migrant Population Statistics 2019).

Therefore, by 1 January 2018, the European demographic picture was the following: EU states had 39.9 million newcomers, which constitutes 7.8 % of the entire European community (European Union 2019). Here, we have to highlight the age factor: the European population was much elder than migrants: the age of the EU citizens was 44 years (Eurostat 2020), as for the newcomers their median age was 36 (Migration and Migrant Population Statistics 2019). Despite the existing demographic situation at the first Global Refugee Forum in Geneva, the European Commission declared financial subsidies for the EU states for the settlement of more than 30,000 refugees and migrants for the current 2020 year (European Commission 2019). It is worth noticing that participating in the construction of common European space, EU Member States; besides the development of their state migration policy also has a great impact on the development of community migration policy standards. EU countries have different migration policy experiences. They are still independent players on the field.

Currently, there is no consensus on how many Muslims are residing. Since certain research, groups give variable figures. This is because the researchers define the borders of 'Europe' in different ways, rely on different statistical calculations and survey results in individual countries. The ambiguity of the results is also because of the overwhelming majority of countries the category 'religion' is not included in the census, and therefore there are no reliable sources of information. The presence of illegal immigration, the extent of which is not always easy to assess, also complicates the situation. All this is complemented by the inevitable approximation of forecasts for the future. But, despite the existing difficulties, serious research makes it possible to draw up a general picture and predict the most likely development of the situation; they allow to discard extreme projections that either belittle the number of Muslims or (which is more common) dramatize the situation and the creation of a pan-European caliphate in the coming decades (Mukhetdinov and Boroday 2016).

It is worth highlighting that the fertility of migrants moving here exceeds the fecundity of Europeans by two to three times so that their number in Europe will double in 20-30 years, which will exacerbate demographic problems. In addition to the number of Muslim migrants, the number of Europeans who accept Islam is growing: there are already hundreds of thousands of them. There are even extreme forecasts of Western analysts, according to which the adoption of Islam by Europeans under the influence of

migration processes in 50 years can make Europe the main center of the Islamic religion. Very characteristic in this regard is the situation in the UK. If in 1981 the number of Muslims (immigrants from Pakistan, India, and Bangladesh) was estimated at 750 thousand here, now there are about 3 million, and the number of births in the UK itself is at least 50% of this number. According to forecasts, by 2050, there will be no 'ethnic majority' in Britain; it will be washed away by interethnic marriages and the import of foreign labor (Chetverikova 2005).

FUTURE DEMOGRAPHIC PERSPECTIVES

For a brief overview of demographic issues, we can refer to the materials of the Pew Research Center. Pew Center's report is one of the most detailed sources of the problem of Muslim demography in the world. It is interesting primarily because it gives the dynamics of the growth of the Muslim population and a projection up to 2030. The Pew Center's report is characterized by moderate and balanced estimates based mainly on official sources. Sometimes, however, moderation leads to some underestimation of the indicators, but such shortcomings are inevitable in demographic studies. It is worth noting that the materials cited are given to introduce the problem, and they in no way claim to be a complete and exhaustive description of the situation. Thus according to the statistics of this center we can see, during the last two decades, the Muslim population of Europe has increased from 29.6 million (4.1%) to 44.1 million (6%); it is assumed that by 2030 it will be about 58 million people (8%).

Despite the high growth, the Muslim population of Europe will amount to only 3% of the global population by 2030, which is comparable to modern figures (2.7%). By 2030, in 10 European countries, the share of the Muslim population for instance in France it will reach up to 10.3%, Belgium -10.2%, as for Russia here the percentage will be 14.4. It is worth highlighting that currently, the number of Muslims living in Russia is about 16 million 379 thousand; it is predicted that by 2030 Russia will have to be one of the most Islamized European countries with 18 million 556 thousand followers of Islam (Pew Research Center 2011). However, the Muslim population of Russia has a long history that dates back to the times of Catherine the Great monarchy (r.1762-1796). It should be noted that exactly this period is marked by the peaceful co-existence of Muslims and Christians, which can be a good example of religious tolerance (Akhmetova 2013).

Roman Silantyev, who is considered a Russian expert in the field of Islam in his book 'The Newest History of Islam in Russia' writes that the history of Islam in Russia has not an exact date, since the information about the appearance of Islam varies: for instance certain historians claim that firstly Islam appeared in Russia in the year 642, it is the time when Muslims overran Dagestan (North Caucasus Region of Russia, populated mostly by Muslims); as for another group of scholars, they state that proliferation of

Islam started in Bulgaria, the Volga basin in 922, it is the period when inhabitants of this region began to follow the religion of Prophet Muhammad. Silantyev doubts both dates, as he assumes that the first time Russia met Islam in the XV century (Silantyev 2007). The history of Muslim spread can be divided into three periods: the first during the Tsarist Russia period; the second during the period of Soviet atheism; and the last after the dissolution of the Soviet empire (Alaverdov 2020).

T. Sarrazin distinguishes 5 main reasons for the European demographic problem:

The first main demographic load consists of a shift in the ratio between people of working age and people beyond working age since it is a key factor in assessing the future of Muslims in Europe. The Muslim population is younger. Almost 49% of Muslims are people under 30; among non-Muslims, this figure is 34%. It is assumed that by 2030 the superiority of Muslims in this indicator will remain (42% vs. 31%). It is also believed that Muslim and non-Muslim populations will age significantly by 2030: from 10.5% to 15.9% among Muslims and from 23.8% to 31% among non-Muslims (Pew Research Center 2011).

The second main demographic burden is the aging of able-bodied citizens: 30% of them in 2050 will be at least 55 years old and only 20% between the ages of 25 and 35 years.

The third major demographic burden is population decline from generation to generation. In the long run, it is impossible to imagine a state if the number of births in each generation falls by 36%, and in three generations, respectively, by 74%.

The fourth main demographic load is the different fertility of educated and uneducated strata. In a few generations, this will seriously affect the intellectual potential of society.

The fifth main demographic burden is the growing proportion of people with a Muslim migration history in the general population, partly due to immigration, partly due to higher fertility. Today, there are 2.2 children for every Muslim woman in Europe and 1.5 for non-Muslim women. The gap is expected to narrow slightly by 2030 (2.0 vs. 1.6). In all countries except Bosnia and Herzegovina, the birth rate is higher among Muslims than among non-Muslims. It is especially dominant in Norway, Austria, Finland, Ireland, Kosovo, Serbia, and Great Britain.

In this case, we have to refer to the recent studies that reveal a very interesting fact and say that even if fertility remains at its present level, the EU population will decrease by 30-40 million people. In addition, the age gap will rise, thus by 2050, over 10% of Europeans will constitute the elderly population. On current trends, the EU27 population will increase and by the year 2025 it will make 499 million, however, it will decrease back and by the year 2050, it will make up 470 million. According to the Global report, in 2050 if the flows of migration stop the numbers of Muslims in the EU will not grow so steadily and will weaken the Islamophobic attitudes (European Union 2012).

The fourth and fifth loads will cause a shift in the structure of the population towards the uneducated strata, who are marching in step with a lesser interest in acquiring knowledge, as well as with a lesser ability to acquire it (Sarrazin 2012).

However, there are two very important factors that T. Sarrazin did not consider; the first reason for the increase of the Muslim population is the influx of migrants from South Asia, North Africa, Turkey, and developing countries. The highest rates are in Spain (70 thousand), France (66 thousand), Great Britain (64 thousand) and Italy (60 thousand). It is assumed that by 2030, Europe will remain an attractive region in terms of immigration, but in some countries (Spain, France, Germany, and Great Britain) the figures will drop significantly (Pew Research Center 2017). In addition, the second and I think not less acute reason is that the number of Europeans who convert to Islam is growing: there are already hundreds of thousands of them and unfortunately, it tends to grow.

Besides, the cultural alienation of these migrants and their predominantly illiterate origin, which is reflected in correspondingly poor education, act unfavorably. Thus, the fifth problem sharpens and made even more acute the fourth one.

FOR THE CONCEPT OF ISLAMISM

Certain scholars think that it is wrong to connect Islam and Islamism and perceive them as the same movement since Islam is a religion and Islamism is an ideology based on Islam. Modern Islamism is a comparatively immature political ideology that derives from Islam. However, it is worth saying that Islamism aims to revive fundamental Islam and has a tendency to become a political movement with social ideology. Thus, Islamism tends to transform Islam into a certain political ideology with its rules and embedded lifestyle.

In this regard, it is worth mentioning several definitions of Islamism. For instance, G. Mirsky (2016) thinks that Islamism is a certain trend influenced by the politics of radicalism ideology, and leads to fundamentalism. Here the emphasis is made on the fact that Islamism is a radical ideology. According to the thoughts of another scholar of religious researcher Z. Levin such perception is true, but only concerning radical Islamism. Certain groups of followers of Islamism aim to transform the lives of the whole world in the manner of 'pure Islam'. For this reason, to some extent, such a definition is also legitimate (although it is more suitable for radical Islamism). The radicals assume that Islamism is a global project for rebuilding the world; they think that the world should be back to the times of the Prophet Muhammad, they are sure that Muslims will save humankind from the devastating results of secularism, nationalism, globalization (Levin 2014). Radical Islamism relies heavily on an ideological movement called Salafiyya, however, we have to understand that, many Salafis are not radicals. The followers of mentioned movement assume the Quran and Sunnah of the Prophet as the only basis of

faith and propagate the returning to the life which was led by early Islamic society, they advocate the idea the fundamentalism, and due to this, the movement is perceived as the movement of fundamentalist, as for the word Salafiyya in most cases it is translated as 'fundamentalism'. Malashenko (2006), a Russian famous scholar considers Islamism as the current version of Salafiyya, although, it is important not to forget about the existence of non-Salafi Islamists. Islamic fundamentalism, which is often perceived as political Islam, is just one component in a much more comprehensive process of the revival of Islamic ideas, customs, and rhetoric, as well as the return of the Muslim population to Islam. The main thrust is the Islamic Renaissance, not just extremism, an all-encompassing, not an isolated process. It is important to emphasize that the above-described formulations are more likely the explanation of radical Islamism, but not for the general Islamism, and say nothing about the presence of not less principal appearance as moderate Islamism.

In addition, concerning the above-given descriptions, it is worthy to remember that the Muslims interpret such things as 'laws prescribed by Islam' or 'Islamic principles' in different ways - and here not only radicalism but also quite moderate interpretations are possible. Besides, certain Islamists do not have such a desire to change the entire world following some Islamic principles. Much more often, we are talking about the restructuring of certain countries with a Muslim majority. In addition, the building of an Islamic state (if this is at all a question of it) is a very vague plan. Thus, not every Muslim should be assumed as an Islamist and perceived as a radical, extremist, or terrorist. It is important to understand that such movements do not have religions, since every religion calls for tolerance and peace.

THE RISE OF RADICAL ISLAM IN MODERN EUROPE

The revival of Islam dates back to the 1970s and 1980s, but the events of the 1990s were a pure religious renaissance: in many countries, Muslims began to unite, mosques were restored, and Muslim madrassas, institutes, and universities were opened as well. In this period in the Muslim world, the influence of Islam on all spheres of human activity increased - economy, politics, culture, spiritual life. One of the reasons for this is the specificity of this religious system: Islam is not only a religion but also a way of life. Under Islamic slogans, national liberation movements intensified, political societies and parties, and international organizations emerged. This process went down in history as the 'Islamic revival'. In the 1970s, especially after the 'Islamic' revolution in Iran, a movement known as Islamic fundamentalism made it felt in the Muslim world. The main goal of the latter is a return to the foundation, that is, to 'pure, original Islam', the creation of a society and a state based on the Koran and Sharia (Koshelev and Kosheleva 2014).

The radicals can be distinguished in several directions: the inner one who strictly adheres to Islamic rules in their daily lives; and the political - a sect whose aim is to establish a theocratic government even through arms. In addition, we can claim that all of this contributes to poverty and unemployment (Khanbabaev 2007).

We can conditionally divide Muslims into three groups: a) traditionalists who seek to preserve religious, political, and social institutions in an unchanged form; b) modernists (the same reformists), who are followers of the intelligentsia only, who seek to interpret modern dogmas based on current scientific-technological and social progress in the world; c) fundamentalists as Wahhabis who represent the unemployed crowd (Alaverdov 2020).

Five key reasons for the rise of Islamic radicalism were highlighted by L. Grinin and A. Karatayev, for the first reason they name the collapse of the Soviet Empire atheism since people were eager to practice their religion, it revived very promptly in the whole post-Soviet space and Russia, the second reason was the situation in Balkan region, in this case, the talk is about the rise of Islamic movements. The third one is the fact that Islam grows in European countries is quite a rapid pace; the fourth is connected to the Chechen factor and their temporary victory in the Russia-Chechen wars, and the last fifth factor is the development of the Palestinian Authority (Grinin and Karatayev 2019). Therefore, it can be agreed that Islamism is a transitional phenomenon (Yapp 2004), but it is necessary to clearly and understand that this transition is still quite long in time.

Malcolm Yapp (2004) writes that Islamism is a phenomenon of a transitional period for two reasons: first, it is associated with modernization and its positions can weaken as soon as mobilized society transform to a new lifestyle and get used to the existing situation; secondly, it is typical for young people, and youth passes away. The peak birth rate in Muslim territories is projected in 2025, and then, according to the researcher, the Muslim population, like the rest of the world, will begin to age. Yapp does not see the aging process as one that will solve everything naturally but believes that thanks to it, the problems of mitigating radicalism can be more successfully solved (Grinin and Korotaev 2019).

It is worth saying that after the rise of radical groups there has been a rapid increase in the number of terrorist attacks in Europe. For instance, in 2014, 4 terrorist attacks were recorded in the EU, which Europol experts classified as 'fully or partially inspired by religion', namely, radical Islamism and in 2015 there were already 17 such terrorist attacks, as a result of which 150 people died. Moreover, in the official documents with Europol statistics since 2016, a separate column has appeared which is called 'jihadist terrorism'. In 2016, jihadist terrorism again demonstrates significant numbers in Europe - there were 13 such attacks (of which in France - 5, in Belgium - 4, in Germany - 4), as a result of which 135 people died. According to the accepted academic classification, the following structural components are distinguished in extremism:

extremist ideology, extremist activity, an extremist organization. The ideology of Islamist terrorism, which carries out its criminal activities in Europe in the first two decades of the XXI century, is radical interpretations of the Muslim religion, which lead to such destructive practices as radical jihadism and shahids.

Radical jihadism evaluates the events that take place in the world in the framework of the idea of a holy war, jihad. He proceeds from the belief in the imperativeness and general importance of his ideas, which is accompanied by extreme manifestations of religious intolerance. And yet arrogant religious fanatics go to kill, convinced that they are doing holy work, defending what they consider to be good from what they consider to be evil (Nesprava 2018).

Pew Research Center materials show that Muslims constitute about 6% of the European population, and this number will grow in the coming decades. At the same time, the growth rate will decline, which is associated with a drop in the fertility rate and stabilization of immigration. By 2030, Muslims will make up approximately 8% of the total population of Europe. Thus, we can say that the Islamization of Europe is proceeding at a moderate pace, and no sharp leaps are expected here; the model of Eurabia or a pan-European caliphate appears to be fantastic and demographically impossible (analysts from the Pew Center agree with this). Probably, the moderate increase of Muslims will lead to a more dynamic involvement of Muslims in social phenomena. However, according to another research of the same Pew Research Center, there is a positive fertility trend among Christian mothers. The research says reveals that in recent years Christianity had quite a good birth rate compared to any religion, thus allowing Christianity to have the status of the world's leading religion. However, in the nearest future, in less than the next two decades, the number of babies born to Muslims is expected to modestly exceed births to Christians, according to new Pew Research Center demographic estimates. Thus, we can say that Muslims have a comparatively young population with elevated fecundity rates that is predicted to increase up to 225 million in the years between 2030 and 2035, as for the Christians it is expected to have a scope of 224 million. In this scenario, the Islamic population will slightly increase Christians and the world will have a slightly larger Muslim adherent (Pew Research Center 2017). However, if we consider the above-mentioned fourth reason for the demographic crisis it is very likely that the number can change since not all the children will follow the religions of their parents. Since according to the same research the world's largest religion in 2015 was Christianity, it constitutes one-third (31%) of the world's 7.3 billion people. Muslims occupied second place; their followers were 1.8 billion people or 24% of the worldwide population. The population of the world tends to rise by 32%, which will make 9.6 billion between 2015 and 2060. In that time, the Muslims may become the principal religious group, since it will have a relatively younger population with the highest fecundity. As for the Christians, their followers will increase by 34%, here we can see a small difference in the favor of the Christian future


population. Thus by 2060, the count of Muslims will reach 3.0 billion, which will constitute 31% of the world population, as for the Christians it will be 3.1 billion if we convert it in percentage it will make 32% (Pew Research Center 2017).

CONCLUSION

The migration crisis occurred to be a long-term factor that determines the socio-economic and political development of most European countries. It expresses the ability of the European Union as a supranational entity to ensure the security and interests of its member countries. However, if the migration flows continue, Europe could plunge into chaos: it would face pressure from both migrants who dictate their rules and right-wing European radicals organizing demonstrations throughout Europe. In this case, Europe will be engaged in clashes, and calling for the protection of Europe from Islamisation. All moderate democrats, liberals, multiculturalists that were inherent in a calm Europe a couple of decades ago will soon find themselves between the two camps of radicals: radical migrants and radical right-wing Europeans.

The situation will become more complicated due to the increased number of the Muslim population in the EU. Thus according to the given statistics, we can see, that in the last two decades the followers of Islam in Europe have increased from 4.1% to 6%; and is assumed that by 2030 it will be about 8% of the total European population. However, it is worth saying that Islam is one of the main world religions, which has played a significant role in the history of human civilization. Islamic history, culture, and philosophical and literary heritage are distinguished by extraordinary richness, depth, and diversity. Their achievements, especially in the field of theology and philosophy, are acknowledged worldwide.

Recommendations

- EU population has to change its current hostile attitude toward the migrants, otherwise, it would lead to systematic chaos;
- to understand that as much they insist the newly arrived Muslim accept the European values and forget their own, it will make the situation even more complicated;
- not to mix the radicals with religion, since religion itself has nothing in common with radicalism, extremism, and terrorism, and remember that all the religions ask for tolerance and patience and Islam is not an exception and does not cause any threats to the EU society, thus having more tolerant approach and be more patient toward the Islam; and
- EU countries have to initiate special parental programs and subsidies to increase the European birth rate. 

REFERENCES

1. Akhmetova, E. (2013). Islam in Russia: Historical Facts and Modern Developments.
2. Alaverdov, E (2020). The Politicization of Islamic Society in Post-Soviet Russia. Wroclaw: Journal of Education Culture and Society.
3. Alaverdov, E (2020). Religious Tourism as a Source of Knowledge Sharing and Trading a Case from Russia. In Bari, M. W., Shaheen, S., Fanchen, M. (Eds.), *Accelerating Knowledge Sharing, Creativity, and Innovation Through Business Tourism*. (pp. 132-148). Hershey: IGI Global.
4. European Union. (2019). Key figures on Europe. Statistics Illustrated. Belgium.
5. European Union. (2012). Global Europe 2025. Luxembourg.
6. Eurostat Statistics Explained. (2020). Statistic Explained. Migration and migrant population statistics. Retrieved March 20, 2021, from https://ec.europa.eu/eurostat/statisticsexplained/index.php/Migration_and_migrant_population_statistics
7. European Commission (2019). Resettlement: EU Member States' pledges exceed 30,000 places for 2020. Geneva: Press release. Retrieved March 20, 2021, from https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6794
8. Grinin L. and Korotaev A. (2019). *Islamism and its Role in Modern Islamic Society*. Moscow: Publishing house Uchitel.
9. Grishin, V. and Grishina O., Kondrashov V., Manoilo A., Koshkin A., Bocharnikov I. (2016). Migration crisis in Europe. *Information and analytical bulletin Issue 6 Edited*. Moscow: Federal State Budgetary Educational Institution of Higher Education.
10. Koshelev V. and Kosheleva N. (2014). The phenomenon of Islamism in the modern world. Materials of the Round Table: Society, State, and Religions in the Modern World. Belarusian State University.
11. Khanbabaev, K. (2007). Islamic Radicalism in the North Caucasus. Ideology, Goals, Ways of Financing, *Journal Free Thought*. No. 3.
12. Levin, Z. (2014). Essays on the nature of Islamism. Moscow: Russian Academy of Science.
13. Mirsky, G. (2016). Radical Islamism: the power of an idea. Thunderstorm from the East. How will the world respond to the ISIS challenge? Moscow: Eksmo.
14. Malashenko, A. (2006). The Islamic Alternative and the Islamist Project. Moscow: *The whole world*.
15. Malashenko, A. (2015). Islamism as a Long-Term Factor in Global Policy. In Savateev, A. D., Kisriev, E. F. (eds.), *The Islam Radical Movements on the Modern World Political Map*. Vol. 1 (pp. 97–126). Moscow: Lenand.
16. Mukhetdinov, D., & Boroday S. (2016). Islam in Europe. Textbook. Moscow: Publishing House Medina.

17. Nesprava, N. (2018). Radical Jihadism in Europe at the beginning of the XXI Century. Dnieper: Taras Shevchenko National University of Kyiv.
18. Pew Research Center (2011). The Future of the Global Muslim Population. Retrieved September 15, 2020, from <https://assets.pewresearch.org/wp-content/uploads/sites/11/2011/01/FutureGlobalMuslimPopulation-WebPDF-Feb10.pdf>
19. Pew Research Center (2017). The Changing Global Religious Landscape. Retrieved September 18, 2020, from <https://www.pewforum.org/2017/04/05/the-changing-global-religious-landscape/>
20. Pew Research Center (2017). Europe's Growing Muslim Population. Retrieved September 9, 2020, from <https://www.pewforum.org/2017/11/29/europes-growing-muslim-population/>
21. Sarrazin, T. (2012). Germany: Self-liquidation. *Journal Political Animal*.
22. Silantyev, R. (2007). The Latest History of Islam in Russia. Moscow: Algorithm.
23. Yapp, M. (2004). Islam and Islamism. *Middle Eastern Studies*, 40(2), 161-182. Retrieved September 9, 2020, from <http://www.jstor.org/stable/4289903>



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LEGITIMISATION OF AUTOCRACY IN TURKEY AND RUSSIA THROUGH THE REVIEW OF THE CONSTITUTION

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Abstract: *The review of the constitution emanates from the constitution, from the institute of constitutional review of which the latter is closely related to the dynamic processes in society as well as with the demand for sustainable stability, stability which very well it may be economic, political or social, national or international, the stability that affects even the constitutional order itself in a state. In this article, we will address the constitutional changes, the amendments over the years In Turkey and Russia which are 'proof' of the violation of the constitutional order, 'proof' of the impinging of democracy and stability in the country. Through this article, we will see that the constitutional system, rule of law, democracy or its consolidation, the stability in the country to a large extent are influenced by the way it is conducted the constitutional review process. The application or non-application of this instrument has multi-dimensional effects, negative, destabilizing ones.*

Keywords: *Review; Constitution; Amendment; Stability; Autocracy*

INTRODUCTION

The constitutional provisions, among others, aim to guarantee not only legal stability but also political, economic, and social stability, enabling stability 'for the society' of a certain country. In the constitutional provisions section of the normative text, a vital place is occupied by the provisions that regulate the amendment or review of the constitution. No part of a constitution is more important than the rules that regulate its amendment and the rules against its violation. The stability of the constitutional order affects the very stability of a country. In defense against the violation of the stability of the constitutional order, of stability in the country, various measures can and should be taken, where one of the measures taken to restore the stability of the constitutional order is the amendment or review of the constitution.

It is impossible to draft an unchangeable constitution. It was Thomas Jefferson himself who said "Some men look at Constitutions with sanctimonious reverence, and deem them, like the Ark of the Covenant, too sacred to be touched. they ascribe to the

men of the preceding age a wisdom more than human and suppose what they did to be beyond amendment" (Google 2018). The constitution is generally presented as a dynamic act. The change, its review is the act that makes the constitution a dynamic and long-lasting act (Albert 2015). Changing the constitution in a dynamic society is a necessity. Dynamism is a vital phenomenon of everyday life that brings situations that need to be adjusted, changed, due to changing circumstances, ideas, or views. Stability in a country and constitutional order are often conditioned by active actions in function of new dynamics that force a change of the constitution.

In this article, we will see how the institute of constitutional review can serve the political agenda of the leaders of a country, namely in Turkey. In this article, we will see how the undertaking of constitutional amendments in these two countries has brought instabilities not only to the constitutional system but also to these countries. In the interest of the research, we have used the following methods: the historical method, the sociological and legal method, the analytical method, and the case study method.

In this article, we will address the constitutional changes, the amendments over the years which are 'proof' of the violation of the constitutional order, 'proof' of the impinging of democracy and stability in the country. Through this article, the 'unannounced King', autocracy, the degradation of constitutionalism, killings, arrests, persecutions, are a 'very nice EUREKA' for me that I am digging for reality, for the truth, but the findings of this article are a bitter reality for the Turkey of nowadays.

Some of the questions that will be answered in this article are, for Turkey: How democratic is an Assembly that undermines the concept of control and balance? How much political prudence does have the deputies of an Assembly that abolished the principle of separation of powers? Why can't the presidential system in Turkey be compared to the American system as Turkey has been trying to do to justify the amendments undertaken? To continue with the questions regarding Russia: Does the Constitution of the Russian Federation of 1993 represent the transition from autocracy or socialism to democracy or capitalism? Or it is more a well-written constitution but does not represent at all a change of ideologies? Did the overthrow of the old constitutional order in Russia brought about a radical change in the article or reality? Did 'authoritarian' tendencies change with the adoption of the new constitution in Russia? Could or should the new 'revolutionary' constitution prevent totalitarianism?

TURKEY'S CONSTITUTION OF 1982

The Constitution of the Republic of Turkey has been in force for 38 years and has been amended 19 times over the years (Yazıcı 2017). The Constitution of the Republic of Turkey (hereinafter CRT) of 1982 has in its content the Preamble and 7 Parts with the respective Chapters and 177 articles. The table below gives a panorama of all the changes through the years of the CRT . The 1982 Constitution was drafted in an

atmosphere where it was the military that appointed the Constituent Assembly (Gönenç 2008). The current constitution, which has been in force since 1982, essentially preserved the system of government formed by the Constitution of 1961, however, presidential powers and prerogatives were strengthened (Gönenç 2008). The Constitution of the Republic of Turkey since its adoption in 1982, as well as its amendments was far from the concept of constitutionalism. Arbitrariness, lack of control and balance, strengthening of one government power to the detriment of another government power, lack of rule of law (especially in the case of 'exploitation' of the declaration of a state of emergency, which was accompanied by the restriction of several rights) are characteristic of the CRT of 1982 or and its changes or reviews over time.

The basic purpose of the constitution is to replace arbitrary reign with a government in which the rule of law is given priority and where the power is limited by various rules as well as by the legal and institutional mechanisms (Coşkun 2013). To give a more concrete definition, constitutionalism "requires that the basic functions of the state be distributed among the various bodies and offices, that fundamental rights be recognized and constitutionally preserved, that governmental authority is subject to legal norms and that independent courts be established as a final guarantee for all the above requirements" (Coşkun 2013, 96). The CRT of 1982 in its provisions since its adoption and throughout the changes over the years has protected the interests of the authoritarian state and not the rights of the individual. This is evident not only in the fact that a state of emergency is envisaged (as most states provide for it in their constitutions) but also in the way this provision is 'used' to restrict the rights of the individual in protecting the interests of those in power.

The latest case is the declaration of a state of emergency, declared in July 2016 and which continued until after June 2018 when the general elections were held. Turkey's 1982 constitution, which is in force, has failed to uphold the values of modern constitutionality. This especially considering the original text of the constitution, it can be said that: The governmental authority that drafted the Constitution of 1982 chose to protect the interest of the state instead of the individual, to privilege the authority of the state instead of individual freedoms. Consequently, the text of the constitution contained several declarations incompatible with the principles of democratic governance and the rule of law (Coşkun 2013), which I have dealt with extensively below in recent amendments.

The political situation in the country, the social and historical context, the political vision of the leaders of the time who are in power when the constitution is drafted or amended, affect the way a constitution is drafted, in the priorities set, and the rights protected. The rights guaranteed or limited in the constitution also show the level of democracy in that state, the fulfillment of the role of the state in a democracy, which among other things, is the regulation and guarantee of the rights of the individual. While in the CRT we can observe the opposite. It has often been observed that the

primary purpose of the Constitution of 1982 was to protect the state against the actions of its citizens, rather than to protect citizens from state violations, which are in fact what a democratic constitution, should do (Özbudun 2011).

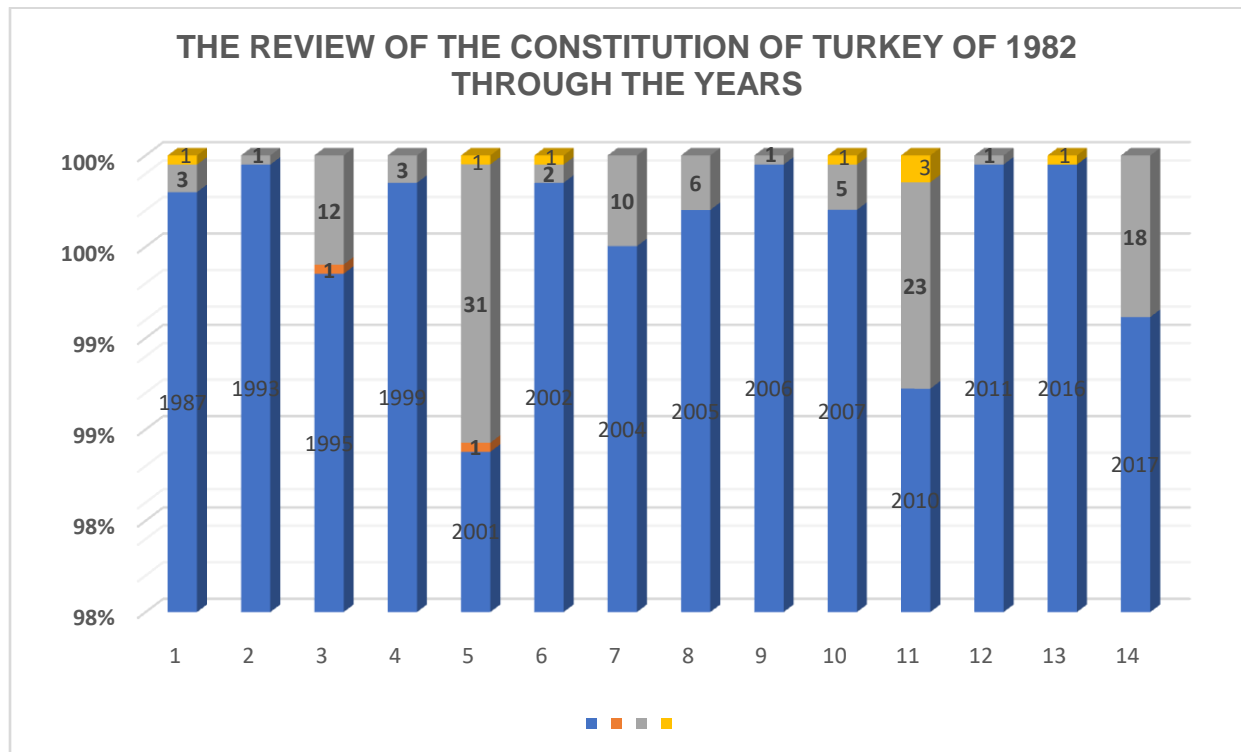
The restriction of human rights and freedoms, the low level of democracy, must be accompanied not only by criticism but also actions aimed at regulating or envisioning provisions that are in defense of the rule of law and democracy. The constitution received great criticism from all social groups as soon as it came into force, who expressed their demand for changes. Consequently, successive governments began to change the original text immediately after its adoption (Özbudun 2011).

Despite the amendments adopted so far, the current CRT of 1982, especially with the last changes of 2017 has taken many steps back. There are changes concerning the rights provided in the original text of 1982, but the mechanism of protection or guarantee of these rights is in the will of an authoritarian state, where the implementation of the constitution and the rights recognized in the constitution are conditioned by the vision political power of the ruling party. This happened with the recent constitutional changes, where Erdogan's political vision was accompanied by the declaration of a state of emergency; with changes in the type of government, amendments that looked more like a new constitution than amendments to the current constitution. However, we must emphasize that the need and demand for a new constitution remains very current in Turkish society. There is no doubt that a new, democratic, and rights-based constitution will be a service to the country's efforts to address the historical problems that transformed into chronic problems due to the continued delays in resolving these problems over the years (Özbudun 2011). Keeping in mind the infringement of democracy, the impinging of the constitutional order that the amendments of the year 2017 brought in Turkey we will elaborate in detail the amendments approved and their role in the stability of the country.

THE CONSTITUTIONAL AMENDMENTS OF THE CONSTITUTION OF THE REPUBLIC OF TURKEY IN 2017

After decades of changes, with a new form of government, the CRT from 1982 is more like a new constitution. The CRT from 1982 has changed 14 times over the years (Table 1).

Table 1. The review of the Constitution of Turkey through the years (review and changes in its Preamble, articles, and temporary articles) (Source: own study)



The latest constitutional amendments are those undertaken in 2017, amendments that laid the foundations to continue the anarchic and autocratic political vision of the leader of this country Coup d'état (as labeled by President Erdogan), political crisis, state of emergency, thousands killed, hundreds of thousands arrested, other thousands of hundreds fired from work or persecuted, this is the panorama under which work began for 1) constitutional changes; 2) approval of these constitutional changes in the Assembly, and 3) approval of amendments by referendum. This was the ideal chaos to start implementing the totalitarian objectives, already enabled by the announcement and holding of general elections under the conditions of the state of emergency that was declared in July 2016 and continued until the June 2018 general elections. The European Commission Report of 2017 noted that:

the emergency situation is associated with serious problems where there are 31 decrees taken under the state of emergency. These decrees are not subject to careful and effective consideration by parliament. These decrees are not subject to judicial review and none of them has been the subject of a decision by the Constitutional Court. These emergency decrees have particularly restricted certain civil and political rights, including freedom of expression, freedom of rally, and procedural rights. The following report shows that over 150,000 people were detained, 78,000 arrested and over 110,000 civil servants fired (Turkey Report 2018).

The Report goes on to describe the circumstances surrounding the referendum, which states: "In April 2017, Turkey held a referendum which approved the constitutional amendments by a narrow majority establishing a presidential system. The amendments were assessed by the Venice Commission as provisions that lack sufficient control and balance and endanger the principle of separation of powers between the executive and the judiciary. The referendum itself raised serious concerns about the overall negative impact of the state of emergency, the unequal ground of the 'game'" (Turkey Report 2018) on both sides of the campaign, and ineffective safeguards for the integrity of the election. After reading this Report, after reading the constitutional amendments, some questions arise as follows:

- Does the referendum hide the false democracy?
- How democratic is an Assembly that undermines the concept of control and balance?
- How much political prudence does have the deputies of an Assembly that abolishes the principle of separation of powers?
- How can this presidential system be compared with the USA system, as some tried to do?
- What is the content of these constitutional amendments that the Venice Commission openly opposes?

The 2017 amendments relating to the neutrality of the judiciary; increasing the number of deputies from 550 to 600; criteria for parliamentary candidacy, to be elected deputy; holding elections every five years and at the same time for Parliament and the President; changes regarding the competencies and responsibilities of the Parliament; responsibilities related to the controlling authorities of the Parliament; election of the President; duties of the President; criminal liability of the President; Vice-Presidents and Ministries; repeat elections; state of emergency; repeal of Military Courts; High Council of Judges and Prosecutors; budget regulation; provisional article; the President who can be a member of the party and the deadline when the changes will be effective.

The Law no. 6771 on Constitutional Amendments contains 18 articles adopted by referendum, most of which entered into force after the elections for the Grand National Assembly of Turkey and the President (Council of Europe 2017) (out of 18 amendments 3 have entered into force and we will tackle them below). The play with words begins in Article 1 of the constitutional amendments.

Article 1 of the constitutional amendments regulates the change in Article 9 of the CRT where the word 'impartial' is added after the word 'independent'. Is it not ironic that attention is paid to the adding of a word, while according to the following amendments we will see that the largest and the most important part of the Judiciary will be appointed by the President, the President who will continue to be a member of the political party legally? On one hand, it was added a word to Article 1 of the CRT and on the other hand, it was ruled out the principle of the separation of powers giving the President the right to appoint the major part of the Judiciary.

Article 2 of the constitutional amendments regulates the amendment to Article 75 of the Constitution, where the words 'five hundred and fifty' are replaced by the words 'six hundred'. Article 3 of the constitutional amendments regulate the amendment to Article 76, where the words 'twenty-five' are replaced by the words 'eighteen', in Paragraph I, and the words 'who have not performed compulsory military service' are replaced by the words 'who are performing military service', in Paragraph II of the same article.

The constitutional amendments to Articles 2 and 3, are numbers, are calculated, are well calculated, and are part of the plan to pass constitutional amendments through the Assembly and the referendum. The promise that 50 deputies will be added is not an insignificant stimulus to guarantee a few more votes during the debates and discussions of the package of amendments. Reducing the age of the right to be elected is a lucrative proposal for two reasons:

- It creates ambitious opportunities for aspiring young people, perhaps and rightly so, to be part of the Assembly at the age of 18 and more importantly; and
- Exemption from compulsory military service is a very important constitutional promise for most young people who want to 'escape' military service.

Article 4 of the constitutional amendments regulate the amendment to Article 77, where it specifies that: "The elections for the Grand National Assembly of Turkey and the Presidency of the Republic shall be held on the same day every five years; A deputy whose term of office expires is eligible for re-election; If the simple majority is not obtained in the first round of Presidential elections, the second round of voting is held according to procedure stated in Article 101". According to this article now the election for the Grand National Assembly of Turkey and the Presidency of the Republic shall be held on the same day every five years.

Article 5 of the constitutional amendments regulates the amendment to Article 87, which is amended as follows:

The duties and powers of the Turkish Grand National Assembly are the adoption, amendment, and repeal of laws; debate and approve budget proposals and final accounts; decide on the currency and declare war; approve the ratification of international treaties, decide by a three-fifths majority of the Turkish Grand National Assembly to declare amnesty and pardon; and to exercise the powers and perform the duties provided for in other articles of the Constitution.

Article 6 of the constitutional amendments regulates the amendment to Article 98, which is amended as follows:

The Turkish Grand National Assembly shall exercise its powers to obtain and supervise information through parliamentary inquiry, general debate, parliamentary inquiries, and written questions. A parliamentary inquiry is an audit conducted to obtain information on a specific topic; A general debate is the consideration of a specific topic related to the community and the activities of the state in the Plenary Session of the Turkish Grand National Assembly; A parliamentary inquiry is an inquiry for the Vice-Presidents and Ministers conducted according to the fifth, sixth and seventh paragraphs of Article 106; A written question is a request for information addressed to the Vice Presidents and Ministers by the Members of Parliament to be answered in writing within fifteen days; The form of submission, content, and scope of motions and investigative procedures are regulated by the Rules of Procedure of the Assembly.

According to the constitutional amendments of the above 2 articles (Articles 5 and 6 of the CRT), the Turkish Grand National Assembly has been deprived of the previous constitutional right to monitor, control, call them for interpellation, conduct investigations or request a motion against the Cabinet and Ministers.

With the amendments to Article 98, it is noticed a political movement to suppress and keep under wraps the Vice Presidents and Ministers. Can it be implied that in any case if Vice President or Ministers do not know how to surrender to the President, the first threatening and warning step is provided in Article 98 amended:

A parliamentary inquiry is an inquiry for the Vice Presidents and Ministers conducted according to paragraphs five, six, and seven of Article 106. A written question is a request for information addressed to the Vice Presidents and Ministers by the deputies to be answered in writing within fifteen days.

Article 7 of the constitutional amendments regulate the amendment in Article 101, where according to its content the fact that a person can be elected President of the Republic at most 2 times can be considered positive. The abolition of the obligation of the elected President to sever political relations with the Party to which he belongs is an open violation of the principle of the President's impartiality. Article 8 of the constitutional amendments regulates the amendment to Article 104 where "executive power belongs to the President". With the new changes, there will be no Prime Minister. The President will appoint and dismiss the Vice Presidents, Ministers, Senior State Officials, Ambassadors, and foreign representatives, ratifies and promulgates international treaties, holds referendums, etc.

Strengthening the position of President not only limits the role of the Grand National Assembly of Turkey but risks having an autocrat as President who has power over the judiciary (in appointments and dismissals of the most important institutions), over the executive (which he leads, in appointments and dismissals) over the legislature (which has a very limited power).

Article 9 of the constitutional amendments regulates the amendment to Article 105, on the indictment, investigation, and trial of a case against the President. 1) An indictment can be filed against the President before parliament with a motion accepted by an absolute majority of deputies (301 deputies' *pro*). 2) The investigation can start only if 3/5 of the total number of the Grand National Assembly votes in favor (360 deputies' *pro*). 3) For the case to be sent, if it is considered reasonable, to the Supreme Court, it must have the vote in favor of 2/3 of the total number of the Grand National Assembly voting in favor (400 deputies in favor). For the autocrat, the importance of political, dependent institutions is as great as that of constitutional amendments. The inviolability of the autocrat is certain because according to the Constitution the majority required to send the case to the Supreme Court is a majority required for amendments to the Constitution.

The constitutional amendments to Article 10, which regulates Article 106 of the Constitution, contradict the statement that the American presidential system is being 'imitated', to empower the state, its economic empowerment. According to the Constitution of the United States of America, the President and the Vice President, both of them, are subject to election by the electorate. According to the amendments regulating Article 106 of the Constitution the Vice President in Turkey will be appointed by the President after the election. In the USA, the Vice President takes the place of the President, while in Turkey the elections for the new President (in case of a vacancy) must be held within 45 days. You cannot justify undemocratic reforms, constitutional amendments hiding behind examples of other countries that one pretends to imitate.

Article 11 of the constitutional amendments regulates the amendment to Article 116, where among others specifies that:

The Grand National Assembly may decide to renew elections with a three-fifths majority of the total number of members. In this case, the general election of the Grand National Assembly and presidential elections shall be held together. If the President of the Republic decides to renew the elections, the general election of the Grand National Assembly and presidential elections shall be held together.

Again here we see the tendency of control and the important role that the unclaimed 'King', the President will have over the decision to renew the elections. Article 12 of the constitutional amendments regulates the amendment to Article 119 recognizing the exclusive right of the President to declare a state of emergency, whereas previously this was the right of the Council of Ministers. Constitutional restrictions during a state of emergency are known. The state of emergency was used to hold the referendum on the 2017 constitutional changes, and it was used to hold the general elections in June 2018.

The constitutional amendments to Article 13 that regulate Article 142 of the Constitution provide for the Repeal of the Military Courts - where this is one of the amendments that entered into force with the adoption of the referendum.

The constitutional amendments of Article 14 regulating Article 159 regulate the reform of the High Judicial Council and Prosecutors; wherein some key appointments of higher judicial instances the President of the Republic will have its role.

Article 15 of the constitutional amendments regulates the amendment to Article 161 related to the budget and final accounts. This amendment added 8 paragraphs to Article 161 of the CRT. This article regulates the timing of the submission by the central government of the budget bill to the Grand National Assembly, what happens in case the budget law cannot be put into force in time.

Article 16 of the constitutional amendments regulates changes, adjustments, removal, and addition of words to various articles of the Constitution. Among the changes included in this article, it is worth mentioning the 'innovation of 3 government powers in 1', (being ironic here) - where the President is given the right to appoint 13 of the 15 members of the Constitutional Court. Constitutional changes are now even safer in the hands of the President!

The constitutional amendments of Article 17, which contain provisional provisions, regulate the entry into force of some constitutional amendments. Among the provisional provisions worth mentioning is the setting of the date for the elections of the Grand National Assembly of Turkey and the President. The date set for holding these elections was 03 November 2019. But the current leader, as an experienced strategist for his visionary autocracy, had to take advantage of the state of emergency.

The transitional provision has already been violated; the election date was set for June 24, 2018. In violation of the constitutional provision where the election date was

November 3, 2019, and the new election date was set on June 24, 2018. The Parliament is not and will not be strong enough to investigate and impeach a President that violates the Constitution as it proved so after the violation of this article of CRT.

Article 18 of the constitutional amendments regulates the time of entry into force of the constitutional amendments approved by the 2017 referendum.

Turkey's hidden agenda has been revealed but the path or consequences of this hidden agenda cover many secrets and unknowns that we still do not know. What we do know is that the democracy has been violated, the principle of the separation of powers has been infringed, the constitutional order is in danger as are the people of Turkey that want a country ruled by rule of law and democratic values.

THE CONSTITUTION OF THE RUSSIAN FEDERATION FROM 1993

The end of the 80s, the beginning of the 90s coincides with the time of revolutions, changes in the 'bloc' of Eastern Europe, including Russia. It was the time of revolution, great upheavals, and radical changes in the political, social, and economic order. The path from authoritarianism to democracy (however fragile and transitional the latter may have been), was accompanied by revolution, the overthrow of the existing order, and the establishment of a new order characterized by pluralism, separation of powers, the guarantee of rights, and freedoms basic of the individual. In response to a growing economic crisis and the separatist movement from the Republics, the Politburo sought to restore the dominance of the Communist Party of the Soviet Union in the legislative process (Chauvin 1994). The failure of the conservative coup of August 1991 showed that there could be no withdrawal without bloodshed from a state in which legitimacy stems from the people, not from a political party or a faction (Chauvin 1994). President Boris Yeltsin, when faced with a situation that paralleled the 1917 revolution, chose to support a peaceful transition to a free society, rather than gaining approval with bullets (Chauvin 1994).

The driving force that helped the revolutionary initiative that brought radical change was not one, but several. These driving forces in Russia led to deep social, political, parliamentary, and constitutional crises in the country. The old politics was trying to resist change but time showed that it was impossible to withstand the 'pressure' exerted by the driving forces of that time. It was impossible to resist the driving forces, it was difficult to fight and win with the time factor, the social factor, the political factor, the economic factor, the international factor.

These driving forces these factors dictated the necessity of overthrowing the existing social, political, economic, constitutional order. Despite the efforts of the then leader, Mikhail Gorbachev, for economic recovery, this not only failed, but months later the economic situation deteriorated (Look; Mannheimer 2008). Despite this, Gorbachev began to liberalize the political climate, allowing criticism of the government, and in this

context, undertook changes to the text of the constitution to achieve this goal (Look; Mannheimer 2008). The transformation of the state had begun a process of transformation of the constitution. The old constitution had been changed more than three hundred times (Krylova 2015). It was full of contradictions. It was completely clear that the new government needed a new constitution (Krylova 2015). The old constitutional cycle would be replaced by a cycle, a new constitutional process. The action of internal and external forces, of the national and international factor, was accompanied by the necessity of overthrowing the existing constitutional order and the birth and development of an order that would resolve the existing revolutionary contradictions that would bring radical changes in statehood, in government, as well as in constitution-making process.

The ground for drafting and approving a new constitution was ready. And in 1993 the new constitution was approved. But naturally, questions arise: Did the overthrow of the old constitutional order in Russia bring about a radical change only on the article or even in reality? Did 'authoritarian' tendencies change with the adoption of the new constitution in Russia? Could or should the new 'revolutionary' Constitution prevent totalitarianism? To answer these questions, I will rely a little on Montesquieu and writing by Chauvin.

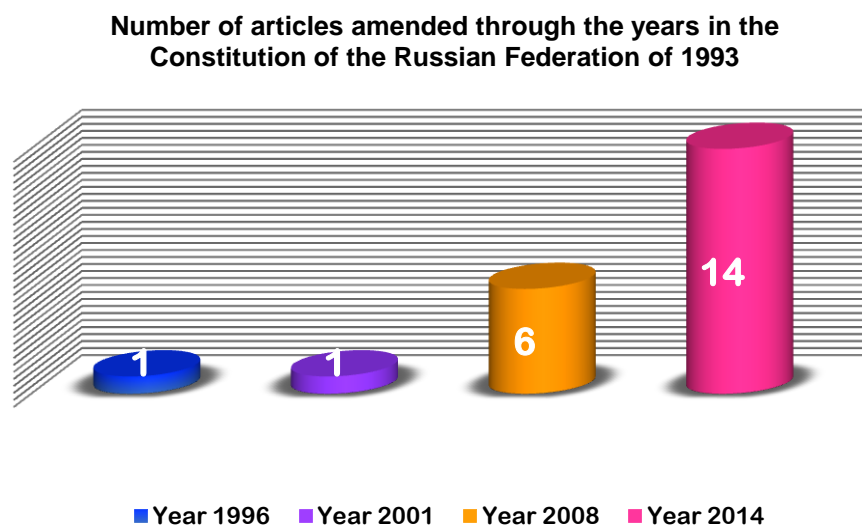
In Russia, on the other hand, fabrications of the power of the Communist Party of the Soviet Union have penetrated every inch of Russian life, demanding the creation of a completely new system of government (Chauvin 1994). If a "revolution destroys the models of a systematic government, but the model of systematic thinking that produced this government has remained intact, then those models will be repeated in the next government" (Chauvin 1994). Montesquieu's words are perfectly fitting for all authoritarian rulers throughout the history of Russia and the Soviet Union; "All the blows were against tyrants, none against tyranny" (Chauvin 1994).

The Constitution of the Russian Federation of 1993 had its point of support. The Constitution of the Fifth French Republic served as one of the most important models for drafting the Constitution of Russia in 1993 (Schmid 2010). The Constitution of the Russian Federation was adopted by National Referendum on December 12, 1993, and entered into force on December 25, 1993 (Amended in 1996, 2001, 2008, 2014). The Constitution of the Russian Federation has 137 articles, the Preamble, and two parts.

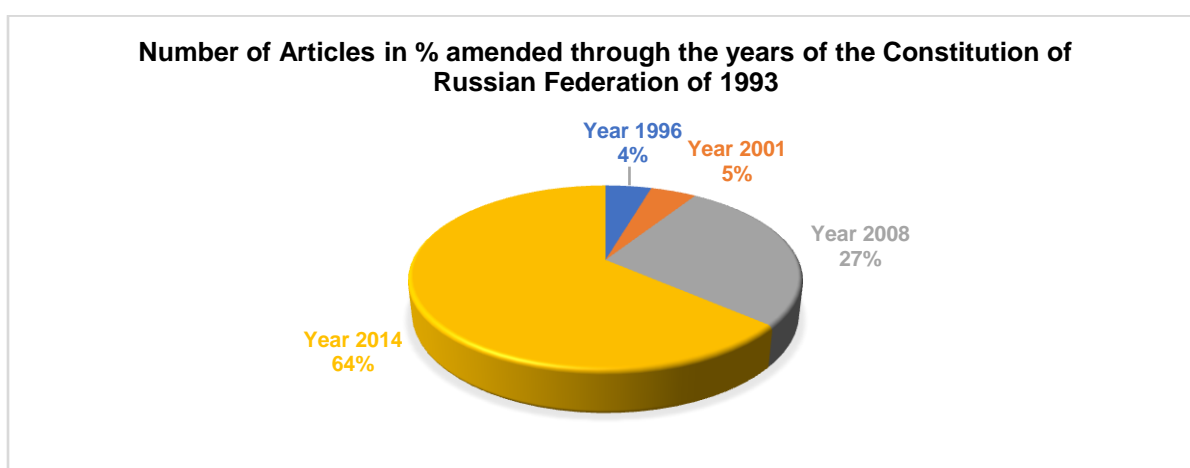
THE CONSTITUTIONAL AMENDMENTS TO THE CONSTITUTION OF THE RUSSIAN FEDERATION FROM 1993

The timing of the drafting and approval of a constitution also affects the details, the regulations provided for the institute for the review of the constitution. The review of the Constitution of the Russian Federation (hereinafter CRF) is regulated in Articles 71 (letter a); 92 (paragraph 3); 134-137. The changes in the CRF from 1993 to 2008 were

not substantial; they did not bring major changes in the constitutional system (Graph 1). These changes have had more to do with the constituent units of the Russian Federation, with correction or adjustment of terms based on changes made by federal constitutional laws. According to the content of CRF, the essential changes are ascertained in 2008 that had to do with the extension of the mandate of the President and the State Duma as well as the establishment of the obligation of the Government to report to the State Duma (Graph 2).



Graph 1. The review of the Constitution of the Russian Federation through the years (22 articles in total)
(Source: own study)



Graph 2. The review of the Constitution of the Russian Federation through the years in percentage
(Source: own study)

The stability of the legal system in a country, the stability of the constitution is conditioned by its role and its activity to guarantee the protection of the constitutional order and the implementation of its constitution. Guaranteeing the stability of the constitution is the type of procedure applied for constitutional review and amendment. The 'rigidity' of the CRF with its two separate methods of change shows that it is not a guarantee to protect the constitution. The stability of the constitution is guaranteed not only by the rigidity of the amendment procedures, its review process but also by the implementation of the provisions provided in it. Russia has a "rate of change of articles below average" (Fruhstorfer 2017), between all Central and Eastern European countries (Fruhstorfer 2017). But the effect is not a "preservation" of the political system (Fruhstorfer 2017). Rather, we can observe the frightening Russian practice of changing the constitution through organic law (Fruhstorfer 2017). Petersen and Levin describe this as "*de facto* changes that take place outside or under the constitution" (Fruhstorfer 2017).

Recognizing the reality of the last 25 years in Russia, comparing this reality with 137 articles of the CRF, I say that the amendments to the CRF give us an overview of the applicability of the implementation of the CRF, show us the ease of undertaking major changes even if we are talking about a rigid constitution. The provisions to amend or to review the CRF failed to impede the fulfillment of the autocratic vision of the President's figure. The 'protectors' and 'guarantors' of the CRF with the amendments in the CRF, although in a rigid constitution found their way to it:

- Established the 'autocracy' from where an individual 'could' be, until now 14 + 6 = 20 years President of Russia (Article 81/1); - Vladimir Putin, the 20-year-old President, who managed to get 4 presidential terms, (2000-2008) (2012-2018) and (2018-2024);
- Strengthen the control of the President in the legislative power by increasing the powers regarding the appointments and dismissals of the representatives of the Federation Council (Article 83/e);
- Strengthen the role and control of the President in the judiciary system through the proposal for appointment and dismissal to the Federation Council of the Prosecutor General and his deputies, as well as the President's exclusive right to appoint and dismiss public prosecutors of the constituent units of the Russian Federation, as well as prosecutors, except public prosecutors of cities, districts (Article 83/f); - Also the President has the constitutional right to appoint and dismiss them;
- Extend the mandate of the State Duma from 4 years to 5 years, which can be interpreted as a 'reward' on the one hand to facilitate the adoption of the constitutional amendment of the President's mandate and on the other hand a 'gift' to the institution that historically dominated by the ruling government party (Article 96/1);

- Merged and 'unite' the High Court of Arbitration (Articles 102/g; 102/h; 126; 127; 128/3);
- Extend the jurisdiction of the State Duma, strengthening the State Duma's control function over the Government. This expansion at best can be interpreted as strengthening the legislative power, but at worst and more realistically it can be interpreted as further strengthening the position of the President. Why? How? Does not the President dissolve the State Duma? The President keeps the State Duma under pressure, the latter keeps the government under pressure, for the President (Articles 103/c; 114/1/a);
- Politicizing the Constitutional Court? The decision of the Constitutional Court of 16 June 1998. Nr. 19-P "On the interpretation of certain provisions of Articles 125, 126 and 127 of the CRF" (Vereshchagin 2015), the Constitutional Court declared that the laws should be uniform and that contradictory interpretations of constitutional norms by different courts are inadmissible.


One of the reasons for the review of the constitution is or should be the preservation or establishment of stability in the country. The review of the CRF of 2008 had a destabilizing role in the country. The changes in the CRF of 1993 did not come as a result of the instability of the constitutional system, of any crisis or transition period in Russia. These amendments, I mean the fundamental amendments, have taken place to implement the agenda of political will represented by the current President. The amendments in the CRF of 1993 have gradually legitimized the visionary revolution for autocratic power.

CONCLUSION

In the Republic of Turkey and the Russian Federation as well, the constitutional amendments provide us with an overview of how constitutional amendments can be turned into a means of implementing the 'agenda' of its political leaders. Substantial amendments in their constitutions of these two countries have come so that to implement the political will agenda represented by the current Presidents. Changes in the CRT and the CRF have gradually legitimized the visionary revolution for autocratic power.

In Turkey, the constitutional amendments bring the transition from a parliamentary system to a presidential system, where the President is given a range of powers that have transformed the President into a formally unannounced 'monarch'. Through the amendments undertaken and approved, Turkey has started a new stage where democracy has been shaken, autocracy has paved its way, constitutionalism has been hit, the three powers have been concentrated in the hands of a single person and all this is legitimized by the constitution and laws.

In Russia, under the word democracy and for democracy or under the slogan for the people and with the people, constitutional changes that were undertaken do not represent the people, do not represent the values that this nation embraces. The amendments in this country represented the hidden political interests and agendas and not the interests of the people.

Nowadays, dictatorship, authoritarianism, totalitarianism have reduced the degree of democracy during and through the process of constitutional amendments, as we saw both in the case of the Republic of Turkey and the Russian Federation. 

REFERENCES

1. Albert, R. 2015. Amending constitutional amendment rules. *I•CON*, 13(3).
2. Chauvin, M.P. 1994. Towards the Establishment of Constitutionalism in Russia. *Indiana International and Comparative Law Review*, 3(271), 281.
3. Council of Europe. 2017. European Commission for Democracy Through Law (Venice Commission), Law No. 6771 Amending The Constitution, Cdl-Ref (2017)018, Opinion No. 875/ 2017, Strasbourg, 23 February, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad\(2017\)005-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2017)005-e)
4. Coşkun, V. 2013. Constitutional Amendments Under the Justice and Development Party Rule, *School of Law, Dicle University, Insight Turkey*, 15(4), 96, http://liberal.org.tr/upresimler/insight_turkey_vol_15_no_4_2013_coskun.pdf
5. Fruhstorfer, Anna, 2017. Paradoxes of Constitutional Politics in the Post-Soviet Space, *University of Illinois Law Review*, Vol. 2017, supra note n. 30, p. 772, <https://illinoislawreview.org/wp-content/uploads/2017/03/Fruhstorfer.pdf>
6. Gönenc, Levent, 2008. Presidential Elements in Government, Turkey, *European Constitutional Law Review*, 4: 488–523, supra note n.35, p. 494.
7. Google 2018, <https://founders.archives.gov/documents/Jefferson/03-10-02-0128-0002>
8. Krylova, Ninel S., 2015. The New Constitution of Russia: Main Principles and Features, *Akron Law Review*, Vol. 27:3,4, 2015, supra note n. 2., p. 397, <https://core.ac.uk/download/pdf/232682368.pdf>
9. Mannheimer, David, 2008. A Comparison of the American and Russian Constitutions, *University of Alaska Anchorage Vol. 24, No. 4 Supplement*, 2008, <https://scholarworks.alaska.edu/bitstream/handle/11122/10604/ajf.244aw.constitutions.pdf?sequence=1&isAllowed=y>
10. Özbudun, Ergun, 2011. Turkey's Constitutional Reform and the 2010 Constitutional Referendum, *Mediterranean Politics | Turkey*, 2011, p. 191, https://www.iemed.org/observatori-en/arees-danalisi/arxius-adjunts/anuari/med.2011/Ozbudun_en.pdf
11. Turkey 2018 Report, 2018. European Commission, Commission Staff Working Document, Strasbourg, 17.4.2018 SWD (2018) 153 final, <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-turkey-report.pdf>
12. Schmid, Ulrich, 2010. Constitution and narrative: peculiarities of rhetoric and genre in the foundational laws of the USSR and the Russian Federation, *Studies in East European Thought*, 2010, p. 446, https://www.alexandria.unisg.ch/69970/1/2010_Schmid_Constitutions.pdf
- Vereshchagin, Alexander, 2007. *Judicial Law-Making in Post-Soviet Russia*,

Routledge-Cavendish.

13. Yazıcı, Serap, 2017. Constitutional Amendments of 2017: Transition to Presidentialism in Turkey, GlobaLex,
https://www.nyulawglobal.org/globalex/2017_Turkey_Constitution_Amendments.html



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SOUTH AFRICA'S MIGRATION DYNAMICS: FROM SEGREGATION TO INTEGRATION

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Abstract: Migration is an extremely complex and sensitive concept. The main research purpose is the migration phenomena from the perspective of integration policies adopted by the country of destination concerning the process of cross-border immigration. In this research, we used as a case study the events in South Africa from 2014 until 2019. We chose this country because of its economic development, relative prosperity being one of the main reasons why migrants chose this country. The government is obliged to rethink its policies regarding the status of migrants. Using a qualitative approach, we used four levels of analysis (access to education, labor market, healthcare, political participation) to conduct an exploratory study on how South Africa's government manages the integration policies. Using official documents and media articles we tried to determine the main characteristics of public policies in regards to integration in terms of social, economics, and politics.

Keywords: Integration Policies; Immigration; Education; Labor Market; Healthcare; Citizenship; Political Rights; South Africa

INTRODUCTION

Immigration, even though an old phenomenon, continues to be perceived as a real catastrophe. The refugee crisis has come to emphasize this negative feeling about migration. However, there are international organizations that deal with migration from both perspectives: positive and negative. For example, the United Nations, through Sustainable Development Goals, believes that migration can help reduce poverty, the fresh workforce has a double impact on both sending countries and destination countries (Hagen-Zanker, Postel, and Vidal 2017, 12-13). But, there are some states such as South Africa which are not that keen on immigrants' integration policies.

After 1995, South Africa faced an increasing number of immigrants. Also, this phenomenon coincided with the period when xenophobia was rooted in South African society. However, at first, there was some discursive ambiguity. So, on the one hand, speeches were referring to Pan-African elements, on the other hand increasing the number of those who wanted to restrict the access of immigrants to South Africa (Gordon 2017, 1-2). At present, immigrants from South Africa are making transformations at the societal level. For example, criminality has alarming rates of 34 / 100,000, with many conflicts between natives and foreigners, the number of crimes having xenophobic motivations also is growing (Kollamparambil 2019, 1-2).

Our article aims to analyze how South African authorities integrate immigrants, taking into account the ambitions formulated by the UN within the 2030 Agenda. Our question is whether the Government of South Africa is an element that hampers the integration of immigrants into South Africa?

We believe that immigration policies and legislation in South Africa do not allow migrants to properly integrate into society. To support this argument, we intend to conduct a structured analysis on 4 dimensions: access to education; access to healthcare, access to the labor market; access to citizenship, and political participation. Thus, using a qualitative approach, in the following sections we will analyze the main features of the four dimensions in the idea of creating a clear picture about the integration status of immigrants in South Africa.

SDGs AND IMMIGRANTS' INTEGRATION

In 2015, the UN adopts the 2030 Agenda for Sustainable Development, through which it proposes to alleviate the negative effects of the most pressing problems faced by humanity. The main element of the 2030 Agenda is the 17 Sustainable Development Goals, which were created as a way for states to work together to achieve these goals through multi-dimensional strategies. These objectives are also of particular relevance to migration issues as they deal with issues of gender equality, access to education and healthcare, the elimination of social discrepancies (United Nations 2019).

Before starting our analysis, we need a clear delimitation of the concept of integration concerning assimilation and acculturation. There is a whole debate about the differences between assimilation and integration. Assimilation is the process through which immigrants become similar. Assimilation has also positive aspects, for example, acquiring a new language can bring you benefits in the labor market (Brubaker 2001, 541). On the other hand, integration, in the European vision, refers to the development of social cohesion and the preservation of cultural homogeneity, especially the issues related to the mother tongue (Schneider and Crul 2010, 1144). In addition, the concept of integration also involves structural aspects, i.e. it also refers to the inclusion of migrants in the education and health system. Also, structural issues become important

when we aim to measure or analyze the degree of integration of immigrants into a society (Schneider and Crul 2010, 1145). Between the two concepts is the term acculturation, which implies that immigrants take cultural elements from the host state, but they also retain their own identity (Entzinger and Biezeveld 2019, 7-8).

The concept of integration can be structured in several dimensions. The first dimension is an incidence, which can be structured into two subcategories, frequency, and intensity. Frequency refers to the number of ties/contacts that an individual has. A second dimension refers to the identification, thus, the more a person identifies himself with a certain group, the more the individual will feel closer to the members of that group. In addition, there is also a structural dimension that refers to increasing the social participation of the individual in a large group. As far as the cultural dimension is concerned, it refers to aspects that concern the identity and values that individuals share (Entzinger and Biezeveld 2019, 4-7).

IMMIGRANTS' ACCESS TO EDUCATION

Immigrants' access to education remains a problem in the current context of integration. United Nations through SDGs prioritizes access to education, including immigrants' access to education systems in destination countries. But in a world where there are over 31 million immigrant children, how can they be integrated? In addition, although immigrant access to education would bring major benefits to the state, it should not be forgotten that large migration flows can cause some difficulties to this process (Nicolai, Wales, and Aiazzi 2019, 1). Nicolai *et. al.* consider that the challenges that migrants encounter in accessing education can be divided into 3 categories, legal, socio-economic, and linguistic challenges (Nicolai, Wales, and Aiazzi 2019, 10). In addition, two things need to be pointed out when discussing this topic, firstly, the education of migrants-children produces beneficial effects in the long run, secondly, integration policies in the education system must be supported by other policies (Nicolai, Wales, and Aiazzi 2019, 11).

The topic of education can be approached from several perspectives. On the one hand, if we talk about ethnic groups, there are major differences in access to education. For example, in the United States, immigrants from Latin America, because they come from poor families, have lower chances of going to college, unlike Asian immigrants, the latter having families with higher incomes and a different social organization (Baum and Flores 2011, 186-187). On the other hand, the access of migrants to education can also be analyzed from the perspective of supplementary schools. This kind of school is an alternative through which migrants can consolidate their ethnic identity and improve their social capital (Tereshchenko and Grau Cárdenas 2013, 454). In addition to social capital, supplementary schools attract migrants who want to have a broad portfolio of

knowledge and skills, becoming competitive in the labor market (Tereshchenko and Grau Cárdenas 2013, 465).

The case of South Africa is contradictory in terms of migrants' access to education. Thus, the Bill of Rights of 1996 states that access to education must be granted to all, while the Immigration Act of 2002 restricts the right to those who are "illegally foreigners" (SA's Contradictory Laws Discriminate against Children of Migrants 2018). However, this ambiguity can be easily resolved, as the Constitution of South Africa states that access to education must be granted to all. Also, South Africa signed the International Covenant of Economic, Social, and Cultural Rights, which tackles the issue of immigrants' access to education. Currently, as a result of successful lawsuits and decisions taken by the Constitutional Court, immigrants are more likely to have easier access to the education system (#HumanRightsDay: Migrant Children in SA Have Limited Access to Healthcare, Education n.d.).

The problems of South Africa in terms of access to education are known internationally. A 2009 UNICEF report also shows the legislative ambiguities and the fact that many immigrants, due to the difficulties they have in obtaining residence documents, cannot enter the education system. The same report emphasizes the positive aspects of this situation on the entire country. Thus, relaxing the admission procedure for immigrants in the education system would bring an important contribution to the fight against HIV, South Africa having a high percentage of HIV patients (Palmary 2021, 17-20).

IMMIGRANTS' ACCESS TO HEALTHCARE

Regarding access to healthcare, some elements can be detached from the literature. First, there is a significant gap between healthcare policies at the local, regional and international levels. This is also due to the lack of clear international standardization on migrant access to healthcare. Secondly, migration and healthcare are in a relationship of interdependence, immigrant access to health services having a positive impact on host states, creating a dynamic and competitive labor market (Tulloch, Machingura, and Melamed 2016, 8-10). The example of Canada can be precious because it shows the degree of interdependence between socio-economic factors and the health level of immigrants. In short, the background and social status of migrants influence their access to healthcare in the destination countries, in addition, the health status of migrants may constitute an important factor based on which they are or not accepted to enter into a particular country (Dunn and Dyck 2000, 1590-1591). Therefore, access to healthcare along with other items such as the education or labor market becomes an important element in measuring the degree of integration of immigrants in a specific area (Ager and Strang 2008, 185).

Taking into account the legislative blurring of the 1996 Constitution, the access of refugees, and generally immigrants to the health system, varies greatly, according to Theresa Alfaro-Velcamp, although immigrants are normally entitled to benefit from emergency medical care, in practice, several documents are required before receiving medical services. There are many cases where immigrants cannot benefit from health care because they do not have all the documentation required by hospitals, and therefore a legislative problem arises because, although the constitution guarantees the migrants right to health care, in practice this is not happening (Alfaro-Velcamp 2017, 53).

The media in South Africa presented in 2014 an incredible case of an Ethiopian child who died because his access to medical care was denied, giving rise to a wave of public opinion xenophobic reactions. The case of the immigrant child from Ethiopia is not unique, this is because of the way the South African authorities attribute the refugee label to almost any immigrant. South African law says that refugees must undertake many steps to benefit from state's protection, which is why they are unable to collect the necessary documents to receive healthcare, although the South African Constitution states "everyone has the right to have access to health care services" (Alfaro-Velcamp 2017, 54).

The South African Constitutional Court does not help too much to improve this situation, the fact that this institution does not make a clear statement in favor of equitable medical assistance to all human beings from South Africa (natives or foreigners) is a strong argument for hospitals and regional authorities to interpret legislation as they want (Alfaro-Velcamp 2017, 55).

Legislative shortcomings also continue in The National Health Act, although this act has a comprehensive approach to the access of the population to health care, in the paragraph stipulating that healthcare should also be provided to vulnerable groups such as children, women, and the elderly, without mentioning refugees or asylum seekers, also, it's the same thing for The Immigration Act (Alfaro-Velcamp 2017, 59). Also, the impact of these legislative issues can be easily noticed through the study conducted in 2012 by African Center for Migration and Society, so, at least 30% of immigrants from major South African cities face many challenges when they want to access the medical system (Alfaro-Velcamp 2017, 60).

An interesting study is that of Vearey, Modisenyane, and Hunter-Adams (2017, 89-90), who address the issue of how South African authorities offer access to health services for migrants, the authors believing that healthcare accessible to all would have a positive impact on society and the economy of South Africa. Moreover, taking into account that almost all types of migration can be found in South Africa, the authors consider it extremely important for the government to take note of migrant typologies and to create special policies devoted primarily to domestic migrants and also to cross-border migrants (Vearey, Modisenyane, and Hunter-Adams 2017, 93).

IMMIGRANTS' ACCESS TO THE LABOR MARKET

Access of migrants to the labor market is another factor through which a vision about the degree of integration can be formed. The impact of migrants in the economic sector varies according to the qualifications and social status they have (Portes and Borocz 1989, 606-607). For example, although Denmark had a significant increase in the number of immigrants, the vast majority were refugees, with a lower presence in the labor market in terms of generating economic growth (Liebig 2007, 6). Also, the integration of migrants into the labor market varies according to the generation, thus the second generation of migrants is more likely to find a job (Liebig 2007, 6-7). Moreover, remittances are extremely important, because they have a major role in the economic development of sending countries, thus contributing to the achievement of global poverty reduction (Hagen-Zanker, Postel, and Vidal, 2019, 12-13).

According to statistical data on immigrants' participation in dirty work jobs, it appears that the number of people choosing to work in these sectors is double that of South African nationals, giving rise to a paradox as South Africa is the most prosperous state on the African continent while at the same time there is a significant number of citizens living on the limit of subsistence (Cobbinah and Chinyamurindi 2018, 2).

Analyzing the literature, we observed that two models try to explain the factors underlying immigrants' decision to take part in dirty work: the model of entrepreneurial careers of Dyer and the mode of challenge-based entrepreneurship by Miller and Breton Miller (Cobbinah and Chinyamurindi 2018, 2). On the one hand, Dyer's model refers to certain antecedents that immigrants have before reaching the labor market, on the other, the second model identified in literature states that 4 aspects play a vital role in the choices that immigrants will make about entering the labor market: types of challenges (social, economic, cultural); conditions and experiences, adaptive requirements, outcomes (Cobbinah and Chinyamurindi 2018, 2). In the studies he undertook, Dyer noted that immigrants who had previously experienced poverty and family problems tended to have an impulsive attitude and isolation, which turned into adaptability issues (Cobbinah and Chinyamurindi 2018, 2).

A very interesting study is that of Cobbinah and Chinyamurindi (2018), the two authors discussed with 30 immigrants from South Africa, trying to determine the factors behind their insertion into the dirty-work jobs. The results of this study revealed some extremely precious aspects of the motivation behind migration, as well as the elements that led the interviewed people to end up doing dirty work (Cobbinah and Chinyamurindi 2018, 4). From the point of view of the motivation to emigrate, respondents said that the socio-economic factors underpin the decision to go to another country, the most common problems being poverty and family problems. Also, those who participated in this study say that the lack of concrete employment opportunities in the country of origin and the desire to experience new things

contributed to the decision to emigrate (Cobbinah and Chinyamurindi 2018, 4-5). As for the factors that compelled immigrants to choose dirty work, the main reasons are related to South African legislation regarding the acts that an immigrant must have to get a job in the formal sector, these issues creating a vicious circle because once getting into the dirty work sector, immigrants begin to have low self-esteem (Cobbinah and Chinyamurindi 2018, 5-6).

Statistical data presents an extremely interesting aspect for the phenomenon of immigration, so in 2009, the Human Development Report states that most of the migration is happening among states with an average level of development, despite the tendency to think that migrants leave from the poorest countries to the richest, therefore Nzinga Broussard's approach is extremely useful as it aims to analyze whether the impact of immigrants on the labor market in middle-developed countries like South Africa is the same as the impact that immigrants have it on the labor market in a developed country (Broussard 2017, 389-391).

Using the data from 3 censuses, Broussard concludes that immigrant insertion in the South African labor market leads to a decrease of native-black employability, which has the same effect in the case of annual incomes of native-black citizens employed in the formal sector. However, following the statistical processing, the author can not accurately show the impact of immigrants on native-black employability in the informal sector, but it can be said that "immigration causes an intersectoral employment shift" (Broussard 2017, 417). Also, Broussard (2017, 418) notes that immigration affects women and native men in South Africa differently, so although income is affected similarly in terms of employability, women are twice as affected as men, moreover, it is necessary to note that native-black women tend to shift to formal to informal sector jobs, the general conclusion of the author is that the authorities of South Africa do not adequately protect native-black from the negative effects that immigration has on the labor market, especially on the formal sector.

IMMIGRANTS' CITIZENSHIP, SOCIAL CAPITAL AND POLITICAL PARTICIPATION

The debate on the relationship between immigrants and the concept of citizenship has evolved steeply over the past decades, so, two approaches emerged. The first refers to the rights and obligations that a migrant has concerning the sending country. The second deals with the modalities and policies by which a migrant can obtain citizenship of the destination state. In short, the notion of citizenship can be defined as "belonging to a socio-cultural community" and can be analyzed through 4 dimensions: legal status, rights, participation, identity (Bloemraad 2000, 9-10).

Literature also shows that the traditional model of citizenship concerning the nation-state has changed and gained new dimensions. Thus, immigrants become

connected with both sending and receiving countries as well as with various types of international forums. Therefore, we can discuss the emergence of new concepts such as multicultural identities or transnational participation (Bloemraad 2000, 30). In addition, although we are tempted to believe that the link between citizenship and the nation-state becomes irrelevant, there remain certain areas where this relationship continues to be a strong one. For example, when we talk about granting political rights or naturalizing an immigrant, the state still plays an important role (Bloemraad 2000, 31). Speaking strictly about the political participation of immigrants, a clear distinction should be made between the actors involved (state/non-state). Furthermore, we need to realize that this type of participation can have several dimensions (civic participation, social interaction, etc.) (Zapata-Barrero *et al.* 2014, 24).

Migrants encounter numerous difficulties in access to citizenship or involvement in society. Laws from South Africa restrict citizenship, for example, refugees can become citizens only 10 years after receiving refugee status (South African Government 2019). Lack of citizenship makes difficult access to other public services such as education or healthcare. Moreover, South African authorities do not seem to be willing to resolve these issues. The recent electoral campaign (2019) has shown that the big political parties have profoundly xenophobic discourse and do not want to solve the problems of immigrants, on the contrary, politicians want to restrict the access of other migrants to South Africa. Xenophobia is also present in society. In a recent interview, a South African businessman born in Somalia said that the South African society still perceives him as a foreigner even though he lives in Johannesburg since 2001 (Tamerra Griffin, 2019). However, ironically, there are small extremist political parties that fight against discrimination of immigrants, for example, the Economic Freedom Fighter Party (far-left) (EFF 2019 Election Manifesto, 52).

CONCLUSION

Integration of migrants concerning SDGs works through the UN 2030 Agenda. Thus, some specialists argue that implementing appropriate policies for immigrant integration can benefit both sending and destination countries. However, before starting an analysis of integration, the concept needs to be carefully delimited. Thus, we have assimilation, a concept that implies the incorporation of culture by other cultures, while acculturation presupposes taking certain elements and preserving the cultural identity. Integration is somewhere in the middle, this concept presupposes 'becoming similar but not identical', trying to preserve the cultural homogeneity of the population which is the target of integration.

Using the 4 dimensions (access to education, healthcare, labor market, citizenship, and political participation) we have seen many issues that make difficult the integration of immigrants in South Africa. The main element that limits the integration

process is access to citizenship. South African legislation proposes very stringent conditions for immigrants who want to become citizens, for example, refugees only after 10 years have the right to apply for citizenship. Lack of citizenship affects immigrants' access to healthcare and the labor market, so these people are gradually isolated by authorities. Therefore, a vicious circle is created. Without education, they cannot have an adequate job, without an adequate job they do not have the financial resources to access other services like healthcare.

The South African state does not directly affirm its desire to change the situation of immigrants. Election campaigns are a good time for major political parties to use populist speeches using the high level of xenophobia of the South African society to get political advantages. Thus, we can conclude that the political factor is one of the main obstacles to the development of the integration process of immigrants. 🌐

REFERENCES

1. Ager, A., and A. Strang. 2008. 'Understanding Integration: A Conceptual Framework'. *Journal of Refugee Studies* 21 (2): 166–91. <https://doi.org/10.1093/jrs/fen016>.
2. Alfaro-Velcamp, Theresa. 2017. "'Don't Send Your Sick Here to Be Treated, Our Own People Need It More": Immigrants' Access to Healthcare in South Africa'. *International Journal of Migration, Health and Social Care* 13 (1): 53–68. <https://doi.org/10.1108/IJMHS-04-2015-0012>.
3. 'Apply for SA Citizenship | South African Government'. n.d. Accessed 17 April 2021. <https://www.gov.za/services/services-residents/citizenship/personal-identification/apply-for-sa-citizenship#>.
4. Baum, Sandy, and Stella M. Flores. 2011. 'Higher Education and Children in Immigrant Families'. *The Future of Children* 21 (1): 171–93. <https://doi.org/10.1353/foc.2011.0000>.
5. Bloemraad, Irene. 2000. 'Citizenship and Immigration a Current Review'. *Journal of International Migration and Integration / Revue de l'integration et de La Migration Internationale* 1 (1): 9–37. <https://doi.org/10.1007/s12134-000-1006-4>.
6. Broussard, Nzinga H. 2017. 'Immigration and the Labor Market Outcomes of Natives in Developing Countries: A Case Study of South Africa'. *Economic Development and Cultural Change* 65 (3): 389–424. <https://doi.org/10.1086/690648>.
7. Brubaker, Rogers. 2001. 'The Return of Assimilation? Changing Perspectives on Immigration and Its Sequels in France, Germany, and the United States'. *Ethnic and Racial Studies* 24 (4): 531–48. <https://doi.org/10.1080/01419870120049770>.
8. Cobbinah, Charles, and Willie T. Chinyamurindi. 2018. 'Motivational Factors for Engaging in Dirty Work Entrepreneurship among a Sample of African Immigrant Entrepreneurs in South Africa'. *SA Journal of Human Resource Management* 16 (October). <https://doi.org/10.4102/sajhrm.v16i0.1025>.
9. Dunn, James R, and Isabel Dyck. 2000. 'Social Determinants of Health in Canada's Immigrant Population: Results from the National Population Health Survey'. *Social Science & Medicine* 51 (11): 1573–93. [https://doi.org/10.1016/S0277-9536\(00\)00053-8](https://doi.org/10.1016/S0277-9536(00)00053-8).
10. 'EFF 2019 Election Manifesto | South African History Online'. n.d. Accessed 17 April 2021. <https://www.sahistory.org.za/archive/eff-2019-election-manifesto>.
11. Entzinger, Han, and Renske Biezeveld. n.d. 'Benchmarking in Immigrant Integration', 53 Erasmus University, pp. 1-53, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/legal-migration/pdf/general/benchmarking_final_en.pdf, Accessed 17 April 2021.

12. Gordon, Steven. 2017. 'A Desire for Isolation? Mass Public Attitudes in South Africa Toward Immigration Levels'. *Journal of Immigrant & Refugee Studies* 15 (1): 18–35. <https://doi.org/10.1080/15562948.2016.1151096>.
13. Hagen-Zanker, Jessica, Hannah Postel, and Elisa Mosler Vidal. n.d. 'Poverty, Migration and the 2030 Agenda for Sustainable Development', 18.
14. '#HumanRightsDay: Migrant Children in SA Have Limited Access to Healthcare, Education'. n.d. Accessed 16 April 2021. <https://www.iol.co.za/news/opinion/humanrightsday-migrant-children-in-sa-have-limited-access-to-healthcare-education-19998388>.
15. Kollamparambil, Umakrishnan. 2019. 'Immigration, Internal Migration and Crime in South Africa: A Multi-level Model Analysis'. *Development Policy Review*, May. <https://doi.org/10.1111/dpr.12382>.
16. Liebig, Thomas. 2007. 'The Labour Market Integration of Immigrants in Denmark', March. <https://doi.org/10.1787/233783261534>.
17. Nicolai, Susan, Joseph Wales, and Erica Aiazzi. n.d. 'Education, Migration and the 2030 Agenda for Sustainable Development', 16.
18. Palmary, Ingrid. 2021. 'For Better Implementation of Migrant Children's Rights in South Africa', April.
19. Portes, Alejandro, and Jozsef Borocz. 1989. 'Contemporary Immigration: Theoretical Perspectives on Its Determinants and Modes of Incorporation'. *International Migration Review* 23 (3): 606. <https://doi.org/10.2307/2546431>.
20. 'SA's Contradictory Laws Discriminate against Children of Migrants'. 2018. *The Mail & Guardian* (blog). 21 November 2018. <https://mg.co.za/article/2018-11-21-00-sas-contradictory-laws-discriminate-against-children-of-migrants/>.
21. Schneider, Jens, and Maurice Crul. 2010. 'New Insights into Assimilation and Integration Theory: Introduction to the Special Issue'. *Ethnic and Racial Studies* 33 (7): 1143–48. <https://doi.org/10.1080/01419871003777809>.
22. 'South Africa Has An Anti-Immigration Problem, And It Looks A Lot Like America's'. n.d. BuzzFeed News. Accessed 17 April 2021. <https://www.buzzfeednews.com/article/tamerragriffin/south-africa-election-xenophobia>.
23. Tereshchenko, Antonina, and Valeska Valentina Grau Cárdenas. 2013. 'Immigration and Supplementary Ethnic Schooling: Ukrainian Students in Portugal'. *Educational Studies* 39 (4): 455–67. <https://doi.org/10.1080/03055698.2013.778194>.
24. United Nations, *Sustainable Development Goals* 'THE 17 GOALS | Sustainable Development'. n.d. Accessed 16 April 2021. <https://sdgs.un.org/goals>.
25. Tulloch, Olivia, Fortunate Machingura, and Claire Melamed. n.d. 'Health, Migration and the 2030 Agenda for Sustainable Development', 16.

26. Vearey, Jo, Moeketsi Modisenyane, and Jo Hunter-Adams. 2017. 'Towards a Migration-Aware Health System in South Africa: A Strategic Opportunity to Address Health Inequity', 10.
27. Zapata-Barrero, Ricard, Lorenzo Gabrielli, Elena Sánchez-Montijano, and Thibaut Jaulin. 2014. 'The Political Participation of Immigrants in Host Countries : An Interpretative Framework from the Perspective of Origin Countries and Societies'. <https://cadmus.eui.eu//handle/1814/29565>.



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GENDERIZING OF THE PARTICIPATION RIGHT IN THE DECISION-MAKING PROCESS: THE ELECTORAL QUOTA AND FEMALE LEADERSHIP IN ALBANIA

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Abstract: *This paper is focused on the Albanian electoral system, its total inclusion approach, protection and promotion of gender characteristics, historical and legal developments on the gender quotas necessity, the comparison in time and space, the barriers and opportunities to promote gender politics in public and social area in Albania. The methodology will consist of a comparative analysis of legislation, the international legal framework, recommendations of international institutions, policy papers on identifying the causes why higher gender representation in politics produces estimated results in the public area, social and economic development. Analysis of the circumstances, historical periods, social and economic impact in legal amendments would be another methodology component. Gender quotas provide a critical minority of women, from 20% to a gender balance of 50%, either as an education of the community to face with real gender balance in common life.*

Keywords: *Albanian Legislation; Quota; Political Parties; Women's Participation; Equality*

INTRODUCTION

The Albanian population consists of 50.1% women (INSTAT, 2019). Women and men are interdependent, but they are socialized in different ways and often operate in different social spheres. As a result, they have different priorities and perspectives. Due to gender roles, in our society, men can hinder or expand options and opportunities for women. Development affects women and men in different ways however both need to be involved in identifying problems and solutions to represent and meet the interests of society as a whole. In Albania, the division of gender roles remains very visible and deep. The division of gender roles begins with the family and then is reflected throughout society. The opportunities for women and men to secure or use resources (food, credit, technology, etc.) or services (education, health care, etc.) are different in different parts of the country. For example, women in rural areas often have access to land or credit,

but they do not have the power and opportunity to make decisions on these resources. Even when women have endless resources, they often do not have the opportunity to take advantage of using them. Women usually work longer instead of men, they have less access than men to one of the most important resources: time. This, in turn, limits women's access to social resources and benefits such as schools and training, which can open up new opportunities for living and income. It affects mostly the participation of women in the decision-making process.

Another argument in women's favor consisted of women are less corrupted than men. The implementation of the Decriminalization Law (2005) supported that. One of the measures of the Decriminalization Law expected to remove from the political and official positions all persons with criminal records inside and outside of Albania. The first year of the implementation of the law (March 2016 – March 2017) resulted in 62 resignations, dismissals, or investigations that affected only 5 women, politicians/female directors. None of these women was accused of criminal deeds. On the other hand, several male politicians and male MPs were affected by the decriminalization process (three MPs resigned, three MPs were dismissed, and 6 MPs are under investigation) and 25 other male politicians were discharged, most of them because of their criminal records. It is particularly hard for women politicians to lead competitive campaigns in areas in which they have to run against candidates with criminal records, and it is considered as one of the most difficult barriers to a qualitative and gender-balanced political representation in Albania (Krasniqi 2017).

If we go in the retrospective of the facts about women's participation in politics and the decision-making process, we will encounter paradoxes such as the communist regime has a high participation of women in politics with about 20.4% of the total number of parliamentarians, 51 women versus 199 men. The democratic pluralist regime offers a low turnout of 11 women against 144 men in 1997 and 10 women against 130 men in 2005 (Parlament.al 2021). For this reason, a major stimulus for women's involvement in politics has been provided by electoral law as an important element in guaranteeing constitutional rights and freedoms and providing equality in elections and solutions.

Another element guaranteeing gender equality in decision-making and politics are political parties, which as voluntary public organizations play an important role in involving women in decision-making positions and their equal participation in the candidate's lists during elections. Apart from Belgium, nowhere else the political parties offer equal gender representations on these lists. In recent years, discussions about increasing women's participation in politics and decision-making were focused on the importance of applying the gender quota system, a system that is directly affected by 'the electoral system'.

LEGAL FRAMEWORK ON GENDER EQUALITY

The principle of equality guarantees that all human beings, regardless of race, sex, religious belief, socio-cultural level, or political status, have equal legal rights. In the context of international human rights law, the legal concept of gender equality is enshrined in both the Universal Declaration of Human Rights and the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW 1979). The Convention, ratified by Albania in November 1994, explicitly and unequivocally states that "discrimination against women violates the principles of rights equality and respect for human dignity"¹. In September 1995, at the World Conference for the Women in Beijing, organized by the UN on the Platform for Action, the world governments reaffirmed their commitment to "equal rights and innate human dignity of all women and men".

According to clause 122/2 of the Albanian Constitution, "International agreements ratified by law have superiority over laws of the country that do not agree with them". Such acts as international instruments on the protection of human rights, gender equality, and the fight against gender based-violence, become part of the Albanian legal system after they have been ratified by the government, approved by the parliament, and published in Official Gazette.

Important acts like ILO Conventions; Istanbul Convention (CoE 2011); New York Convention provide the obligation of Albania to guarantee equality between men and women (Qirjako 2016, 195).

According to the Third Millennium Development Goals, "Promoting Gender Equality and Strengthening the Role of Women in Education, Employment and Decision Making", the national analysis shows that Albania will meet this objective and that the level of policy support, staff, sources of fundings, legal framework, public awareness, etc., would be accessible until 2015 (Progres Report. Council of Ministers 2007). But, the Millennium Development Goals Report 2015, UN states that: "Women continue to face discrimination in access to work, economic assets and participation in private and public decision-making". In this line, the Sustainable Development Goals, through its objectives intend to produce a set of universal goals that meet the urgent environmental, political, and economic challenges facing our world (United Nation Development Program [UNDP], 2012). This pressure affects mostly the Albanian institutions on fulfilling and implementing the legal framework on providing equal premises and conditions for gender equality in all spheres of society. Albania boasts a solid legal framework regarding gender representation, which enables its improvement up to the achievement of a balanced representation.

¹ As one of the most important international instruments ratified by Albania since 11.05.1994, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and its Optional Protocol worldwide is recognized as the 'Constitution of Women'.

Albania's gender gap problem persists due to a discrepancy between *de jure* rights and their *de facto* implementation. In the national context, it is sanctioned in the Albanian Constitution, in its Article 18: "all citizens are equal before the law, and no one can be unjustly discriminated under reasons such as gender, race, religion, ethnicity, language, political, religious or philosophical beliefs, economic, educational, social, or parental affiliation. This discrimination is realized only when there is a reasonable and objective justification".

Further in the field of political freedoms, Article 45 of the Constitution guarantees that every citizen who has reached the age of 18 years, even on Election Day, has the right to vote and to be elected. And it is precisely the fundamental law of the country that guarantees its freedom, equality, individuality, and secrecy. The Constitution also sanctions other freedoms and rights that help in creating an equal environment and conditions for all citizens, guaranteeing special protection by the state. Article 54 stipulates that "children, young people, pregnant women, and new mothers have the right to special protection by the state". According to Article 57, the Constitution guarantees the right to education for everyone and provides compulsory education, the second one open to all, in public and free schools.

Law on Gender Equality, (Law No.9970, 24.07.2008), Article 1 "regulates fundamental issues of gender equality in public life, the protection and equal treatment of women and men with regards to equal chances and opportunities for the exercise of their rights, as well as their participation and contribution in the advancement of all social spheres". In this regard there have been several positive outcomes and changes, mostly accredited to the advocacy work of the civil society in Albania. Gender equality law aims to: i) ensure efficient protection against discrimination of grounds of gender; ii) define safeguards for equal opportunities between men and women, to eliminate gender-based discrimination; iii) define the responsibilities of state authorities - at all levels, in drafting and implementing legislative acts and policies that support gender equality. Gender equality law stipulates that gender mainstreaming shall be the approach to ensure gender equality in society, by reflecting the perspectives of all genders into the law-making, policymaking, planning, implementing, and monitoring processes (Qirjako 2016, 195). It also covers discrimination and harassment and provides for special temporary measures for guaranteeing at least 30% representation of the under-represented gender in a political and public decision-making position for the least represented gender. The law goes further when it charged the political parties as the directly interested institutions obliged through methods and measures to comply with the requirements of the law. In case of fails, they will be charged with fines of up to one-tenth of the state funds for the electoral campaign until they undo the violation (Article 15/3, Law No. 9970/2008). After the elections of 2017 in Albania, the organization of the Government, its ministries, and other public bodies were changed.

The Social welfare portfolio was attached to the Ministry of Health, becoming the new Ministry of Health and Social Protection², including a modest section working on Gender Equality and Gender-Based Violence³. What it started as a National Committee for Gender Equality, with the power to oversee the whole implementation and advancement of gender equality policy of the Government of Albania in 1998, has been reduced to a mere modest section with a limited number of people working for gender equality and domestic violence. While the duties and responsibilities assigned by the Law on Gender Equality and the Law on Domestic Violence to the Section have increased year by year, their staff numbers and budget hasn't increased, putting in serious doubt the state of the implementation of the legislation and the National Strategy and Action Plan on Gender Equality (2016-2020) (CLCI, UNWomen 2019).

Law on Protection from Discrimination as a significant step forward guarantees the protection of equality and non-discrimination⁴ in Albania. It significantly widens the scope of rights and their safeguards for women and men by introducing new concepts and their application in spheres related to the economy and social protection, in addition to the political dimension. Concretely, this law ensures the right of any person for: i) equality of rights by the law and equal protection by law; ii) equality of opportunities to exercise rights given by law, enjoy freedoms and access to public life; iii) effective protection from discrimination and from any form of conduct that produces discrimination. The law defines the Commissioner for Protection against Discrimination as an independent body that safeguards protection against discrimination carrying out an activity of monitoring with powers of imposing sanctions for protection against discrimination. In October 2016 the Government of Albania approved a new National Strategy and Action Plan for Gender Equality (Council of Ministers Decision No. 733/2016). The vision of the strategy focused on: "A society that appreciates gender equality as a precondition for sustainable development and aims to have zero tolerance towards gender-based violence and domestic one". Strategic Goal 2 focused on the equal participation and public engagement of women in public life and decision-making. This goal has two objectives 1) increasing the participation in decision-making of women, and 2) increasing up to 40% of women's representation in public processes of policy-making and planning at the local level.

² One of the ministries with the highest national budget, covering from hospitals and health care to pensions, from cash hand outs to social care.

³ Although officially is not known the number of people working for the Section, it is believed that only 3-4 staff are assigned to work on gender equality issues. Other line ministries and municipalities are required by the law to establish 'gender focal points'. The process to set them up has been supported by the UN Office in Albania and has been considered quite successful.

⁴ This Law guarantees the principle of equality on grounds of: "gender, race, colour, ethnicity, language, gender identity, sexual orientation, political, religious or philosophical beliefs, economic, education, or social situation, pregnancy, parentage, parentage responsibility, age, family or marital condition, civil status, residence, health status, genetic predispositions, restricted ability, and affiliation with any particular group or any other reasons".

GENDER PRESENTATION ON POLITICAL SPECTRUM

Following Article 68 of the Constitution, the candidates for Parliamentary members (MPs) should be presented only by political parties, coalitions of parties, and by the electors. In this spirit, the political party as the first institute of expression and transmission of internal democracy in the national and local political arena has the task to be sensitive on providing political guarantees of both genders and a wider social spectrum in their inclusion on the lists of candidates for MPs. The Constitution (1998) and the Electoral Code are the principal rules which governed the Parliamentary elections. Other applicable provisions include the instructions and decisions of the CEC, the relevant articles of the Criminal Code and the following laws: Law on Political Parties (2000); Law on Demonstrations (2001); Law on Gender Equality in Society (2008); Law on Audiovisual Media (2013) and the Law on Decriminalization (2015).

The Albanian Parliament has 140 members, elected with a four-year mandate. The MPs are elected through a closed-list proportional representation system in 12 multi-member districts. This district constitutes 12 administrative regions in the whole country. Only parties registered in their respective districts that win at least 3% of the votes cast and coalitions that win at least 5% of the votes cast are allocated seats. Coalitions are made up of political parties registered with the CEC (Article 162-163 Electoral Code).

The Law on Political Parties regulates the organization and functioning of political parties. The law goes to great lengths in providing details on principles of the party establishment, but it fails to provide sufficient grounds to support gender equality within a political party. The Law on Political Parties is not harmonized with the legal framework regulating gender equality in Albania, so it needs new amendments by imposing gender equality criteria on political parties as soon as they are established⁵. Gender quotas and proportional gender representation within the parties would create the preconditions for a new political culture stemming from within the political party structures. It would enable new approaches towards gender equality and it would force political parties to compete to appeal more to the voters of both sexes, create safeguards expressed through political programs that are legally anchored, and ultimately increase the quality of political representation for both sexes. The implementation of gender equality law influenced the performance of the public institutions and has an impact on the new amendments of the Electoral Code. The Law on Gender Equality in Society (2008) stipulates for the achievement of a minimum 30% standard for representation of women in all public-sector institutions at national and local levels.

⁵ Sanctioning gender equality and gender-sensitive representation principles for the steering structures of the parties would be an important step that would ensure a greater long-term sustainability, viability, and effectiveness than the periodical reviews of the electoral rules in the framework of the Electoral Reforms.

Consistent with these provisions, the Electoral Code established gender quotas for candidate lists and membership in electoral commissions for the first time. From 7 women that were elected in the Parliamentary Elections of 2005, in 2017 there were 39 women parliamentarians, one of the highest numbers of women MPs since the fall of communism (CEC 2017).

The Electoral Code requires that each candidate list includes at least 30% of candidates from each gender, or one of the top three candidates must be from each gender. This legal requirement was generally met by the political parties registered to run in the 2009 general elections⁶. After the local elections of December 2015, in February 2016, was set up by the parliament an *ad hoc* committee co-chaired by a representative of the majority (SP) and a representative of the main opposition party (DP). They should propose amendments to the Electoral Code according to the recommendations of the Venice Commission and the OSCE/ODIHR (2016). The Parliament amended in 2016 the Law on Political Parties, the Criminal Code, and the Law on Audiovisual Media as a result of the 18 May agreement. But still, some key Venice Commission recommendations were not taken into account, in particular, "strengthening the gender quota" (Article 175, Electoral Code); The Electoral Code gaps create that, the above law changes produce inconsistencies in the overall legal framework.

Nowadays, Albania is under a major political crisis. On 21 February 2019, almost all the members of the opposition parties at the Albanian Parliament rescinded their mandates, leaving a huge gap of political representation including many women (Voice of America 2019). Currently, from 140 members, there are only 122 MPs in the Albanian Parliament and the vacant positions can be replaced after 6 months. Currently, there are 36 women, almost 1/3 of the newly replaced from the opposition party lists of 2017 (Parlament.al 2017). The political infighting and vacuum have further diminished the opportunities for women to have a meaningful role in the workings of the Parliament that above all influences the public life of the country. The women MP's that decided to continue to be part of the Parliament, have been publicly insulted by their parties and media⁷, as being traitors or incompetent to do their job⁸ (Koha Jonë Newspaper 2019).

⁶ For 2009 elections only three candidate lists were registered without meeting either criterion, namely the lists of the Social Democracy Party and of the New European Democracy Party in Lezhë, and the list of the Democratic National Front Party in Berat.

⁷ There have been no cases of prosecutions brought up to the courts or relevant authorities such as the Albanian Broadcasting Media Authority (AMA) on political verbal violence against women politicians, as most of the accusations come from male leaders of the major political parties. The Parliament lacks the strength to hold them accountable as they exercise large influence over their MP's. The Woman Parliamentary Caucus hasn't been able to seriously tackle such issues, neither in Parliament nor publicly, because of lack of bipartisan support and defense of political positions of their own parties from women MP's too.

⁸ *Rudina Hajdari: a traitor or bought by the Government*, Koha Jone, 11 March 2019, article is available on the link: <https://www.kohajone.com/2019/03/11/tradhetare-apo-e-blere-rudina-hajdari-ata-ge-akuzojne-jane/>

The often changes of the Electoral Code of Albania (Law No. 10 019/2008 amended) affected somehow negatively the gender quota, while others had a more positive impact on the political participation and representation of women across the country. The Code guarantees that women and men are represented in at least 30% of candidates' lists for members of the parliament. According to the Code amendments in 2013, instead of list refusal, parties would be fined approximately nine thousand USD if their regional candidates' lists did not meet the quota. For Civil society, this change deduces that gender quota is becoming merely a financial value. Changes to the Code during 2015, consisted of setting up a 50 percent gender quota for Municipality councils, which influence directly the outcomes of local elections of the same year, wherein in the municipality of Tirana, women held 51 percent of the members of the Council. But different was the situation in smaller and some northern municipalities, where women were almost not at all included in the candidates' lists (CLCI, UNWomen 2019). In the municipalities where women were elected as members of the city Councils, several of them were resigning from their public office to be replaced by men, thus making gender quota de facto non-applicable. Among 61 municipalities in Albania (in 2015), only 15 percent of mayors elected were women (CEC 2015), which shows that the 50 percent quota did not apply for mayors.

On 30 June 2019, Albania organized highly contested local elections, where the opposition parties did not take part. In at least 31 municipalities there were no contestants apart from the main Coalition led by the governing party. Only less than 12 percent of the candidates for mayors were women (CEC 2019), and female candidates for Members of Council were less than 44 percent (CEC 2019). The municipalities, earlier governed by women mayors were replaced by men, taking away even a few achievements made for women so far (CLCI, UNWomen 2019).

GENDER PRESENTATION ON POLITICAL SPECTRUM

Even the electoral provisions introduced a gender quota; women are still generally underrepresented in Albanian politics. Historical facts show the level of women's representation in politics. So, during 1920 (INSTAT 2019) the Parliament of Albania was composed only of men. In 1945⁹, they were elected the first women as Members of Parliament. During the legislations of 1997, 2001, and 2005, the participation of women in the Albanian Parliament does not exceed 10% (Parlament.al 2021). The period 2001-2005 showed massive participation of men with 94%, a situation which will be improved with the inclusion of the gender quota of 30% after the Electoral Code changes in 2008. In the parliamentary elections of 2009, the participation of women in parliament doubled from 7% to 16%, a trend that reached 18% in the 2013

⁹ The right to vote for women was won in 1945, this date is the beginning of their political enrollment.

parliamentary elections (Parlament.al 2021). As a result of leaving the mandates, the replacement of men MPs with women MPs, brought that in 2016 we have 24% of women members in Parliament (Krasniqi 2017). Among the eight Parliamentary commissions, the largest participation of women is at the Commission of Labor, Social Affairs and Health with about 50%. This one discusses and revises several laws and initiatives that affect economic empowerment and support for women with social policies. But still, there is a gender division in the composition of parliamentary commissions with the perfect example of the national security commission composed totally by men (INSTAT 2019). The fact is that the participation of women in any commission is not exceeding 50%, of women as the (commission for work, social affairs, and health -50%), the highest percentage of women, but none of these commissions is composed only of women. The changes in the Electoral Code (April 2, 2015) brought significant quantitative changes in the representation of women and girls at local decision-making levels. The composition of the lists of candidates in the elections for local government bodies in 2015 was 10% women and 90% men. The winning candidates for mayor were 15% women and 85% men. According to an estimate made in December 2016, 36% of municipal councilors were women and girls and 64% were men.

According to the UN Women report (2018), there are identified some of the major obstacles for women's political representation¹⁰:

- Legal obstacles are present, with women put in a less competitive position to become representatives and women's quotas to become representatives working poorly;
- Women struggle to wage their political campaigns, facing threats and lacking rights to express grievances about the electoral process;
- The implementation of the clauses on women's quotas show severe obstacles;
- Fewer electoral resources and donors are contributing to women's promotion;
- There is a sense that women candidates who file complaints are treated less fairly;
- Gender stereotypes are widespread and negative about the role that women can play as representatives.

Aware of the obstacles, many organizations¹¹ for years advocated the Alliance of Women MPs, the Parliament, and all parliamentarians for gender equality in decision-making by improving the optimal implementation of gender representation in our electoral legislation. This initiative introduced changes in the Electoral Code regarding the increasing of gender quota by 50% for women's representation in the electoral lists

¹⁰ Titled 'Obstacles to Women's Participation in Elections in Albania - A National Index of Women's Electoral Participation, including across 12 Regions', 2017.

¹¹ Albanian Coalition for Promotion of Women and Youth in Politics in collaboration with other networks and coalitions of civil society working with/and for women.

for councilors candidates, to set the mechanism 1 to 2 along with the entire list and to strengthen sanctions by lists' disclaimer for parties that do not meet the quota in candidates' lists in local elections to municipal councils, to provide a dignified representation of women in local decision making. These organizations contribute to building capacities through training for women and youth's forums of political parties on topics such as electoral campaign's management, electoral systems, the strategy of the campaign, etc; to strengthen their capacities on political parties and election campaigns' management and to increase their representation in local decision making.

In the local elections of 2019 following the law (according to the preliminary report of the OSCE), the CEC registered only those lists of candidates for members of municipal councils that met the condition of inclusion of 50% for each gender, or one in two candidates belonged to each gender. The quota system has created a favorable environment for raising the numbers of women in political life, but few women hold leading positions in political parties. Eleven women ran for mayor, five of them without opponents. Two out of five CEC (Central Electoral Commission) members and 37 percent of CZA (KZAZ) (Commission of the Zone Electoral Administration) members were women. Although a quarter of the KQV (Zonal Central Commission) members observed on the Election Day were women, there were no women commissioners in the 40 percent of KQV observed (Observation Mission of Local Election 2019).

The final result of the local elections 2019, showed a turnout of 49.5% of female voters, while 50.5% of voters were male. Candidates for mayors presented in the lists were 97, of the 11 women or 11.3% and among them 8 or 13.1% women winners (CEC 2019). In the lists for candidates for Council members (CEC 2019), out of 9872 candidates in total, 4839 or 49.02% were women. Winning candidates were 1619, women 706, or 43.6% (CEC 2019).

The position of women inside the political parties is an important factor in the involvement of women in political life. The political party statute, as its constitution, includes programmatic principles that also include gender equality criteria. The political parties function as independent institutions, with their specific ideology, bylaws, organizational structures, grassroots organizations, members, and supporters that enable them to carry out the typical functions of a political party in a pluralist system.

Most of Albania's political parties rely on two main partner organizations for their functioning – the women's forum and the youth forum. None of the political parties in Albania has any of the forums that are usually attached to the European parties, such as forums of the veterans, forums of the entrepreneurs, forums of the trade unions, and so on. The women's and youth forums of the Albanian parties were established much later than their parties (Krasniqi 2017). The reason for such delay is political because these structures (women's and youth organizations) have a negative consideration as an auxiliary organization under the communist regime of the party-state. No woman has ever run for the position of chair in the country's main political parties, the SP and the

DP, in the 30 years of Albania's post-communist pluralism. Towards the end of the nineties, a positive trend was recorded in the Socialist Party, related to the participation of women in races for secondary leadership positions in the party, mostly political secretaries. In two cases SP saw a competition between candidates of different sexes for the position of the Prime Minister. In several cases, the leaders of the women's forums or the persons in charge of gender equality policies and for partner organizations within the parties have been intimidated or just bullied out of a normal political career because the decisions are taken at the party's highest levels (Krasniqi 2017).

This way of handling women's forums has damaged the importance of women's forums by preventing them to establish a political career system for women politicians that could effectively promote new entries through a merit-based system. On the contrary, party leaders often have handpicked and promoted women with no significant political contributions to the party. They have singlehandedly decided who was going to lead the women's forums, and by doing so they have relativized their value (Krasniqi 2017).

The recent party-specific and initiatives aimed at supporting the advancement of the gender quotas in politics, and the public campaigns, declarations, and initiatives launched against domestic violence and gender-based violence, in particular concerning the approval of laws with a specific social and gender-related focus, and the establishment of a network of communication and representation that pays attention to the gender dimension, have yielded positive results (Krasniqi 2017). Even the application of the quota system increased the numbers of women in politics, the women's approach to institutional decision-making and within the party remains isolated.

'There is no membership without equal opportunities for women and men', is one of the requisitions for the membership of aspiring countries in the EU, among them Albania. Women's engagement in politics should not be seen as a condition for EU integration but as a human right and equal opportunity for all. According to that, Article 3 of the Constitution of the Republic of Albania provides that: "the human rights and freedoms constitute the fundamental principles that, this state is obliged to honor and protect".

GENDER REPRESENTATION IN PUBLIC AND PRIVATE INSTITUTIONS

The role of women in decision-making cannot be limited to their participation in politics. The participation of women in decision-making in the public sector in Albania has faced countless challenges and obstacles over the decades. The main problems associated with the low participation of women in high positions in the public sector are related to the patriarchal mentality. Several attempts have been made to take ongoing institutional measures and to correct and fulfill the existing gaps.

Law on Gender Equality in Society, by setting the quota of 30% for the least represented gender, imposed mandatory levels of representation of women as the least represented gender at all levels of decision-making in public institutions. This was the first important step towards improving this situation. The 30% women's quota in Albanian Parliament and local councils offered another image of Albanian politics. This affected significantly on increasing the number of women in Parliament and the improvement of the gender ratio in women's favor compared to the pre-quota period. A positive example is several women representatives in the municipal councils after the establishment of the quota 30% and 50% after 2019. Beyond these positive changes through the quota system, the representation of women in the public system (appointed positions) still lags. Public administration at the local and central levels continues to be reserved for men, especially at high levels of decision-making. Because of the level of politicization of the public system in Albania, gender inequality in higher decision-making bodies and positions is also conditioned by the unfavorable position of women within political parties themselves. Significant steps forward have been taken to improve the situation.

It is observed that in the justice system higher positions, such as Head of the Supreme Court, Head of the Constitutional Court, Head of the Administrative Court of Appeal, the women participation is still missing. Women are increasingly seen in other lower positions in a descending hierarchy. Women's participation in diplomatic missions in 2017 was at satisfactory levels, with 27% Ambassadors being women, whereas in positions such as Minister Plenipotentiary, First Secretary, and Third Secretary, women's participation was over 57%. For the position of First Secretary and Third Secretary, women's participation was 63% and 67%. For the first time because of the direct will of Prime Minister Edi Rama, half of the Albanian government is composed of women; out of 16 ministers, 8 are women, and at the level of deputy ministers this equality achieved 50%. Women ministers are leading very important ministries (as economy, health, education, culture and sport, transport, justice), offering them more political power, but the influence of their leader is very high. Their independent actions are missing.

Regarding Public Administration, women's participation in management positions is nearly the same as men's, 49.7%. The largest share of women is in low management positions by 53.2%, while the lower participation is in medium-level management positions by 39.2% (INSTAT 2018).

Education is one of the most sensitive sectors lacking women's higher levels of representation. The level of education, according to the Labor Force Survey (INSTAT 2018), for the population over 25 years shows the existence of significant differences between generations and gender. 54.8% of women and 45.3% of men have completed compulsory education (8 or 9 years of education), while 17.2% of women and 15.7% of men over 25 years have completed higher education (university). 79% of the women's population over 65 years has completed basic education, compared to 59.8% of men.

Only 6.1% of these groups of women have higher education, compared to 13.4% of men. Meanwhile, the population aged 25-39, shows another situation. 34.7% of women completed higher education, compared to 23.3% of men. In this age group, 43% of women have only basic education compared to 39.1% of men.

According to the level of education and titles, the academic staff presented these data's (period 2017-2018): professors 59.1% men and 40.9% women, PhDs 39.5% men and 60.5% women, docents and pedagogues without titles men 38.3% and women 61.7%, teachers of high school men 33.8% and women 66.2% and teachers in basic education men 26% and women 74% (INSTAT 2019).

According to the public universities data's sources, the academic staff is composed of 10 Rectors from them only one is female, 14 Deputy Rector and 8 female; 164 members of Senate and 90 females; 35 Dean and 18 among them females; 30 Deputy Dean and 28 females, and 122 Chefs of Department and 111 females.

Women's engagement in other sectors of the economy is not so favorable for women. The employment rate (INSTAT 2019) for the population aged 15-64 is 66.7% for men and 52.4% for women. The structure of employees shows that 25.5% of women in the labor force are employed in paid positions while 14.0% of them engage in unpaid work in the family business. For employed men, these figures are respectively 29.4% and 10.0%. However, a significant percentage of men-namely 27.4% - in the labor force are self-employed, compared to 12.5% of women.

According to causes of inactivity, generally speaking, women remain out of the labor force mostly because they are busy with unpaid work at home (21.4%), or are attending school (22.0%). On the other hand, only 1.0% of men declare homework as the reason behind their inactivity, while 30.4% are students or pupils (INSTAT 2019).

Women and men belonging to the 15-64 years old age group are mostly employed in the agriculture sector (50.2% men and 49.8% women). In 2018, the agricultural sector employed 42.3% of women of employees, marking a reduction compared to 2017. Public administration, social services, and other activities and activities are the second sector with the highest share of women's employment after the agriculture sector with 21.4%. The second highest employment sector for men is trade, transport, hospitality, business, and administrative services with 29.6% (INSTAT 2019).

In 2018, according to Labor Force Survey data, the unemployment rate for men aged 15-64 is 13.2% versus 12.3% for women. The unemployment rate has declined for both compared to the previous year (Labor Force Survey, INSTAT 2019).

In the private sector: The number of women owners or administrators of businesses in the manufacturing and service sector has decreased in 2018 by 25.7% compared to 29.7% in 2017.

The number of businesses with women owners or administrators is greater in the Service Sector than in the Production Sector, 33.2%, and 11.8% respectively compared with 2017 (INSTAT 2019). During 2018, based on the data of the General Tax Directorate,

the Gender Pay Gap (GPG) amounted to 10.7% compared to 10.5% in 2017. During this year, in the economic sector, the sector with the highest GPG, namely 24.4%, is the manufacturing sector, while in the economic sector the GPG is the lowest in commerce, transport, hospitality, as well as business and administrative services, by 3.0%. Viewed from the main groups and professions perspective, the gender pay gap is highest for craftsmen and equipment and machinery monitoring employees, by 27.1%. The lowest GPG is noted for the employees of the armed forces, by 2.3% (INSTAT 2019).

The social situation is accompanied by a higher level of women facing extreme violence inside the house walls, which influenced directly the standard of life not only of women but the whole society. According to the new 2019 Women, Peace, and Security (WPS) Index (2019)¹², Albania ranked 57th, a position tied to many cases of domestic violence. In absolute terms, in Albania, are a total of 3,414 violated women. The highest percentage of women subject to domestic violence is concentrated in the prefecture of Tirana with 37.2% violated women, followed by Durres with 14.3%, while the prefecture of Kukës and Dibra marked the lowest percentage with respectively 0.8% and 1.4% violated women. Cases of domestic violence reflect the number of denunciations made to the police, a phenomenon that may even cause a person's death. Thus, out of 51 murders, about 19.6% of them are homicides as a result of family relations (in most cases women are the victims) (Musabelliu 2020). Such developments clearly show that gender stereotypes are still present and stronger than ever in Albanian society, patriarchy is a sensitive issue, the high level of unemployment and poverty among women influences their access to services, opportunities, decision-making, and politics.

CONCLUSION

Gender equality is one of the core pillars of a democratic society. A society that invests in achieving gender equality not only leads to an improvement in the lives of girls and women but also to a positive transformation of the way boys and men live. The involvement of women and men in any planned action, including legislation, policies, and action programs, at all levels and fields, provides maximum guarantees in their implementation in the political, economic, and social spheres. In this way, we ensure that women and men benefit equally. The inclusion of gender perspectives in various areas of development not only ensures human rights and social justice for women and men but also ensures the effective achievement of other social and economic goals.

A society that invests in equal educational opportunities for boys and girls has a Gross National Product growth of up to 25% more than countries that do not invest proportionally in this regard. Also reducing gender inequality (e.g. providing equal

¹² The new 2019 Women, Peace, and Security (WPS) Index analyses 167 countries on women's equality, reveals trends in women's wellbeing across 11 indicators.

opportunities for women's and male's farmers) leads to an increase in agricultural yields of up to 20%. Research on gender inequality in the labor market shows that eliminating gender discrimination in the profession and the salary not only increases women's income but also increases national income.

Working towards gender equality, we can challenge traditional gender roles. Equal opportunities are created for both sexes, improving relationships between men and women.

Challenging stereotypes on gender roles and creating equal employment opportunities for both men and women would also help to slow the traditional role where men are seen as the backbone of the family, depriving them of participation in family life. All this would partially relieve the men of the main burden of decision-making, easing their responsibilities, cause of a mentality based on gender stereotypes that enslaves both women and men.

Creating equal opportunities for both sexes has a positive impact on economic, social, and political aspects, as it is impossible to achieve any significant change for any country if it does not exploit the entire potential of men and women. Significant positive changes create equal opportunities for men and women. 🌐

REFERENCES

1. Anastasi, A. (1998). Political institutions and the Constitutional Right in Albania 1912-1939, *Luarasi*, Tirana, 261.
2. Anastasi, A., & Ollidashi, E. (2006). The systems of electoral quotas and their importance on achieving gender equality in public life, *Studime Juridike Journal*, University of Tirana, Nr. 1/2006.
3. Browne, E. (2017). Gender in the Western Balkans. *K4D Helpdesk Report*. Brighton, UK: Institute of Development Studies, <https://gsdrc.org/wp-content/uploads/2017/06/058-Gender-in-the-Balkans.pdf>
4. CEC, <http://cec.org.al/wp-content/uploads/2020/02/2019-Tabela-Permbledhese-Final-1.pdf>
5. CLCI, & UNWomen. (2019, July) *Report Of Civil Society Organizations For Implementation Of The Beijing Platform For Action In Albania Beijing + 25*, UNWomen, Albania.
6. Comack, E. (2003). Locating Law Race/Class/Gender Connections. *Fernwood Publishing*, Halifax.
7. Corsini, P. & Ad hoc Committee of the Bureau, (2017, 25 June). Observation of the parliamentary elections in Albania, *Election observation report*, Council of Europe, <http://assembly.coe.int>
8. *European gender equality law review* (2009), no. 2,
9. Floqi, K. (1920). *Fondamental right*, Shkodra .
10. Hesford, S. W. & Kozol, W., (2005) Just Advocacy? Women's Human Rights, Transnational Feminisms, and the Politics of Representation. *Rutgers University Press: New Brunswick*, New Jersey and London.
11. Instat, (2018). Men and Women in Albania, 2018, Tirana, <http://instat.gov.al/publikim>
12. Instat, (2019). Men and Women in Albania, 2019, Tirana, <http://www.instat.gov.al/al/publikime/librat/2019/burrat-dhe-grat%C3%AB-n%C3%AB-shqip%C3%ABri-2019/>
13. Krasniqi, A. (2017). *Standards of representation in political parties*, Institute of Political Studies, Tirana. www.isp.com.al, <http://isp.com.al/wp-content/uploads/2018/07/STANDARDS-OF-REPRESENTATION-IN-POLITICAL-PARTIES.pdf>
14. Lundstom, K. (2001). Indirect gender discrimination on the European Court of Justice version, Lund University, Sweden. *Publication "Legal Perspectives on Equal Treatment and NonDiscrimination" (Studies in Employment and Social Policy)* published by Ann Numhauser Henning. Kluwer Law International.

15. Mandro, A. & Anastas, A. (2010) Cases of gender equality on legal standards and national and international case-law, *School of Magistrates*, Tirana.
http://www.magjistratura.edu.al/media/users/4/UNIFEM_permbajtja.pdf
16. Mandro, A. & Gjermeni, E. (2009) CEDAW. Training material for public employers, *Ministry of Labor, Social Affair and Equal Chances*, Tirana.
17. Musabelliu, M. (2020, February). Albania social briefing: Albania and gender (in)equality, *Chine-Cee Institute*, Vol. 26, No. 3 (Al), ISSN: 2560-1601,
<https://china-cee.eu/2020/04/01/albania-social-briefing-albania-and-gender-inequality/>
18. O'Neil, T. & Domingo P. (2015, September). The power to decide: Women, decision-making and gender equality, *ODI report*.
<https://www.pacwip.org/resources/publications/odi-report-2015-the-power-to-decide-women-decision-making-and-gender-equality/>
19. Petrela, I., (2014). Electoral Systems in Europe and the case of Albania (with focus on the current electoral code and general elections held in 2009), *SEE Law Journal*, Vol. 1 No. 1, pp. 35-44.
http://seelawschool.org/pdf/2_Electoral_systems_in_Europe_and_the_case_of_Albania.pdf
20. Qirjako, E. (2016, March). Women Rights and Gender Equality as Per Albanian law, *Academic Journal of Interdisciplinary Studies*, MCSER Publishing, Vol 5 No 1, Rome-Italy, E-ISSN 2281-4612, ISSN 2281-3993.
21. UN Women. (2011). Progress of the World's Women: In Pursuit of Justice. New York, *UN Women*. <https://www.unwomen.org/en/digital-library/publications/2011/7/progress-of-the-world-s-women-in-pursuit-of-justice>
22. UN Women, (2012). *Gender Equality and local Government*, Tirana.
https://www.entwicklung.at/fileadmin/user_upload/Dokumente/Publikationen/Downloads/Themen_DivBerichte/Gender/GELG_publication_2012_ALB.pdf
23. UNDP, <https://www.undp.org/content/undp/en/home/sustainable-development-goals/background/>
24. Viñuales, Jorge E. (2006). Human rights and investment arbitration: the role of amici curiae, *International Law: Revista Colombiana de Derecho Internacional*, núm. 8, junio-noviembre, pp. 231-273 Pontificia Universidad Javeriana Bogotá, Colombia <https://www.redalyc.org/pdf/824/82400806.pdf>
25. Whitefield. S. & Shabani. E. (2018). Obstacles to Women's Participation in Elections in Albania - A National Index of Women's Electoral Participation, including across 12 Regions, *UN Women, Design Grid Cartels*, Tirana,
<https://albania.unwomen.org/en/digital-library/publications/2018/06/obstacles-to-womens-participation-in-elections-in-albania>



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GEORGIAN ETHNOPOLITICAL CONFLICT AS A SUBJECT OF CONFRONTATION BETWEEN THE USA AND RUSSIA

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Abstract: *Since 2009 Russia has increased its military forces in Abkhazia and South Ossetia and pursued the policy of 'creeping annexation' in the occupied territories of Georgia. Today, 20% of Georgian territories are occupied by the Russian Federation. The Russian-backed separatists continuously erect barbed-wire border posts in one of the occupied regions of Georgia-South Ossetia and detain Georgian people, under the pretext of 'illegally crossing the border'. Fundamental rights of the local population are violated daily since the occupants install barbers through people's houses, gardens, and cultivated lands. Innocent citizens are forced to leave their homes, belongings, and cultivated lands that are left beyond the occupants' demarcation line. The paper argues that along with other global challenges of the world, the USA-Russia clashes of interests are also found with the Georgian conflicts. While Washington hugely supports Georgia's territorial integrity and welcomes its Euro-Atlantic aspirations, the Russian Federation, on the contrary, prevents the aforementioned process and directly opposes Georgia's integration into NATO. The USA condemns Russia's creeping annexation of Georgian territories and continuously calls on Russia to respect the sovereignty and territorial integrity of an independent country. Furthermore, the USA-Russia relations have considerably deteriorated following Russia's military intervention in Georgia and the recognition of Abkhazia and South Ossetia as independent states.*

Keywords: *Abkhazia; South Ossetia; USA; Russia; Conflicts*

INTRODUCTION

The disintegration of the USSR (the Union of Soviet Socialist Republics) marked the end of geopolitical tension between the two greatest superpowers of the so-called 'Cold War' the Soviet Union and the United States (USA) whose mutual antagonism lasted for almost forty-five years following the immediate afterward of the end of the World War II. The World watched in shocked amazement how the Union of fifteen

socially, culturally and ethnically diverse groups of states fell to pieces in 1991. Francis Fukuyama (1989) argued that a triumph of capitalism over socialism after the failure of Communism meant the victory of liberal democracy, which would become the last point of socio-cultural evaluation of the society and final form of human government (Lordkipanidze, 2019, 5). During the collapse of the Soviet Union, a furious economic crisis erupted in the number of former Soviet Republics, shaped with massive internal contradictions that the countries were confronted with towards the way of independence. Georgia was one of those republics. In the late 1990s, ethnopolitical conflicts in the country in the autonomous Republic of Abkhazia and the autonomous oblast of South Ossetia turned into a civil war, and this war resulted in vast destruction and also massive human suffering (Lomia 2020, 113; Lordkipanidze 2021, 35; Mgeladze 2021, 12). The Russian Federation played one of the most dominant roles in provoking Georgian conflicts since the separatist forces in Abkhazia and South Ossetia were hugely supported by Russia (Lomia 2021, 63). By 1994 Georgia had lost control of most of the parts of the conflict regions and Russian peacekeepers were stationed in Sokhumi and Tskhinvali. The conflict in Abkhazia resulted in more than 10,000 deaths, whilst during the conflict in South Ossetia, at least 1.000 people were killed. Furthermore, it was estimated that the Abkhazia conflict caused the displacement of around 150,000 people among whom most of them were ethnic Georgians. During the South Ossetia conflict, approximately 60.000 people were displaced and many of them found refuge in Russia (Amnesty International 1998). After years, the growing tension between Russia and Georgia has again escalated on August 7, 2008 (Nikoleishvili and Kiknadze 2020, 123). The five-day war between the neighboring countries ended with the recognition of Abkhazia and South Ossetia as independent states by the Russian Federation. Furthermore, the war demonstrated that small states are still facing serious security dilemmas in the twenty-first century and they are still threatened by big powers to play according to their rules of the game (Maisaia and Kareli 2019, 71). Russian-Georgian war, in August 2008, led the USA-Russian relations to the lowest point since the disintegration of the Soviet Union. The five-day war ended with the recognition of Abkhazia and South Ossetia as independent states by Russia; resulted in hundreds of dead humans and brought innumerable damages to the Georgian economy. Thousands of refugees were forced to leave their homeland. As a consequence of the conflict, more than 26.000 people have been displaced. Today, 20% of the Georgian territory is occupied by the Russian Federation (Maisaia and Khanjaliashvili 2020, 116); (Tskhovrebadze 2015, 43). Since 2008 the USA continually calls on Russia to reverse its recognition of Abkhazia and South Ossetia as independent states and condemns Russia's illegal occupation and creeping annexation of Georgian territories. Washington is actively involved in Geneva International Discussions, which are launched in October 2008 and address the consequences of the 2008 war.

RUSSIA'S ILLEGAL 'BORDERIZATION' OF GEORGIAN SOVEREIGN TERRITORIES

Human rights in Georgia are guaranteed by the state constitution, which came into force in 1995. Since then, it has undergone numerous amendments. According to Chapter 1 Article 7 of the Constitution of Georgia: "The state shall recognize and protect universally recognized human rights and freedoms as eternal and supreme human values. While exercising authority, the people and the state shall be bound by these rights and freedoms as directly acting law" (Constitution of Georgia 1994, 3).

The Government of Georgia and the overwhelming majority of the international community, including the European Union and the USA, do not recognize the independence of Georgian regions (Lomia and Lomia 2020, 36), and believe that Russia's invasion and subsequent recognition is a "blatant violation of fundamental principles of international law-notable the principles of sovereignty and territorial integrity" (Government 2020; Lomia 2019, 62). Georgia is a sovereign, unified, and indivisible state. According to the Hague Regulations of 1907, Fourth Geneva Convention of 1949, and the norms of customary international law, the presence of the armed forces on the territory of a sovereign country without the voluntary consent of that country is an act of illegal military occupation of the sovereign state. According to Article 1 of the Constitution of Georgia adopted on August 24, 1995, Georgia is an independent, unified and indivisible state as confirmed by the Referendum of 31 March 1991 held in the entire territory of the country, including the Autonomous Soviet Socialist Republic of Abkhazia and the former Autonomous Region of South Ossetia, and by the Act of Restoration of State Independence of Georgia of 9 April 1991 (Constitution of Georgia 1994, 1).

Russia's military occupation of Georgian territories and the secession of the regions from the rest of Georgia have continuously been condemned at numerous international forums, the results of one of which are clearly illustrated in the EU-commissioned document "Independent International Fact-Finding Mission on the Conflict in Georgia" (Government 2020; Report 2009). It is worth mentioning that According to Article 42 of the Hague Regulations "Territory is considered occupied when it is placed under the authority of the hostile army" (The Hague Regulations 1907). Its key elements are the presence of foreign forces to establish and exert control; the ability to exercise authority over the occupied territory; and the fact that foreign forces are present without the consent of the sovereign state (Amnesty International 2019, 17).

Since August 2008, Russia has increased its permanent military presence in and beyond the two occupied regions, including areas that were under Georgian-government control before the war. This act of Russia; means a direct violation of the EU-brokered ceasefire agreement signed on August 12, 2008 (Maisaia and Mikadze 2020, 134; The Embassy of Georgia to the United States of America 2019).

By acting like this, Russia has been preventing the EUMM (the European Union Monitoring Mission) to oversee compliance with the ceasefire agreement. The EUMM started its monitoring activities on Georgian territories on October 1, 2008, and has since been patrolling both day and night, particularly in areas adjacent to the Administrative Boundary Lines with the Russian-backed separatist regions of Abkhazia and South Ossetia (EUMM 2019). The EU played a crucial role in ending the Russian-Georgia war. On August 19, at a meeting held in response to the request of France, Council members discussed ways to ensure implementation by all the parties of the six-principle ceasefire agreement sponsored by the European Union presidency and agreed on 12 August 2008. On behalf of the EU, French President, Nicolas Sarkozy, took full responsibility in negotiation between the sides. The six-point ceasefire proposal is as follows: (a) the commitment to renounce the use of force; (b) the immediate and definitive cessation of hostilities; (c) free access to humanitarian aid; (d) the withdrawal of Georgian forces to their places of permanent deployment; (e) the withdrawal of Russian forces to their lines of deployment before 7 August 2008; and (f) the convening of international discussions on lasting security and stability arrangements for Abkhazia and South Ossetia (Repertoire of the Practice of the Security Council 2009). Georgia shows positive economic growth and structural changes within economic activity sectors (Kolosok and Myroshnychenko 2015). In addition to that, as argued by Bedianashvili, for Georgia, “which is a part of Europe, is to manage and establish closer ties with the European countries within globalization processes taking place in the world” (Bedianashvili 2017, 88; Bedianashvili 2018) (Map 1). More than that, Georgia is one of the most important geopolitical hubs in the world and the European Union gives it a unique opportunity in terms of economic growth (Lordkipanidze 2021, 35).



Map 1: Georgian-Ossetian conflict (Source: Wikipedia 2021)

Since 2009, the Russian Federation has commenced the process of 'borderization' in the occupied territories of Georgia. The term 'borderization' is used to describe a process of installing barbed wire fences and artificial barriers by the Russian servicemen along the so-called 'administrative boundary line' of the occupied regions of Abkhazia and South Ossetia. Beyond the one side of the artificial border, remains Tbilisi-controlled territory and on the other side, there is the Administrative Boundary Lines (ABL). Russian-backed separatist forces continuously install and erect barbed-wire border posts in the Tskhinvali region (South Ossetia) and detain Georgian people under the pretext of illegally crossing the border and gradually move the borders near the Georgian-controlled villages (Modebadze 2015; Modebadze and Kozgambayeva 2019; Lomia 2020).

According to the EUMM (2019) in Georgia, as of late 2018 physical 'borderization' along the South Ossetian/Tskhinvali Region included "more than 60 km of security fences, 20 km of surveillance equipment, over 200 'Republic of South Ossetia border' signs, 19 Russian border guard bases and four controlled crossing points". In Abkhazia, physical 'borderization' included "over 30 km of fences, surveillance towers with an ABL coverage of approximately 25 km, 19 Russian border guard bases, and two controlled crossing points" (EUMM 2019).

As highlighted in the research conducted by Amnesty International, the total length of the barbed wire and fencing along the ABL with South Ossetia/Tskhinvali Region by 2018 was more than 52 km out of 350 km. The total length of the barbed wire and fences on Abkhazian ABL was around 49 km out of 145 km. Russia's 'creeping annexation' not only is the process of illegal borderization of a sovereign state, furthermore, Russian servicemen constantly detain Georgian citizens under the pretext of 'illegally crossing the border' since people continue to cross the administrative boundary line to access medical care, see relatives, access agricultural lands, visit graveyards or religious buildings, etc. (Amnesty International 2019).

According to the Georgian authorities, as of late 2018, 34 villages (Near South Ossetian/Tskhinvali region ABL - Nikozi, Gugutiantkari, Khurvaleti, Dvani, Kvemo Khviti, Ditsi, Mereti, Dirbi, Bershueti, Mejvriskhevi, Tvaurebi, Sakorintlo, Ergneti, Ghogheti, Koda, Kveshi, Jariasheni, Zardiaantkari, Koshka, Adzvi, Tsitsagiaantkari, Akhrisi, Kirbali, Akhalubani, Knolevi, Avlevi, Tsitelubani, Atotsi, and Tseronisi; near Abkhazian ABL – Ganmukhuri, Orsantia, Khurcha, Shamgona, and Pakhulani) had been divided by fences by Russian servicemen near the South Ossetian/Tskhinvali Region administrative boundary line, almost 1,000 families have lost their access to agricultural land and woodlands near the ABL (Amnesty International 2019).

HUMAN RIGHTS VIOLATIONS IN RUSSIA'S OCCUPIED REGIONS OF GEORGIA

A 71-year old Amiran Gugutishvili, a resident in the village of Guguriantkari near the ABL with South Ossetia has been living under the poverty line since 2008 after his house was burnt down during the Russian-Georgian war. Moreover, in 2017 he lost access to his orchard because of Russia's borderization policy which has further worsened the economic situation of his family. Amiran Gugutisvili portrays his situation as: "Every year I used to harvest more than a hundred boxes of apples from my orchard and sell it. The profit was enough for my family to survive. Since 2017 I cannot access my garden. Russians installed a 'state border' sign there. I still pass by sometimes to take a look at my apple trees through the fence" (Amnesty International 2019).

Georgian-Russian relations were fraught with tensions over the Giga Otkhozoria case. 31-year-old Giga Otkhozoria of a Georgian nationality was killed on a Georgian-controlled territory, near the Georgian-Abkhaz administrative border on May 19, 2016. Rashid Kanji-Ogli, an Abkhaz border guard was accused of murder. However, the Abkhazian side asserted a completely different version of the incident, claimed that Otkhozoria attacked Rashid Kanji-Ogli first and provoked him into a fight (JAMnews 2016). Georgian Government called upon Russia to assume responsibility for Otkhozoria's case, though, however, Moscow denied taking responsibility and declared that since the murder was committed by Abkhaz bodyguard, Russia, from its side, could not see any responsibilities in it (Agenda.ge 2016).

On August 7, 2017, the Ministry of Foreign Affairs of Georgia Mikhail Janelidze reported that Georgian citizens lived under severe oppression in Abkhazia and South Ossetia. As stated by Janelidze, Abkhazian and Ossetian authorities were doing their utmost to discriminate against Georgian people in breakaway regions. As reported by Janelidze, While Tbilisi seeks to peacefully resolve the 'frozen conflicts', Georgian children are forbidden to get an education in the Georgian language in Abkhazia and South Ossetia, and barbed-wire fences installed by Russian occupants in South Ossetia, make it impossible for Georgian farmers to reach their cultivated lands (Ministry of foreign affairs of Georgia 2018).

A year later, the Archil Tatunashvili case sparked furious outrage in Georgia and abroad. Three Georgian citizens, Archil Tatunashvili, Levan Kutashvili, and Ioseb Pavliashvili were detained from Akhagori, by *de facto* authorities of South Ossetia on February 22, 2018. They were taken to Tskhinvali. 35-year-old Archil Tatunashvili died the following morning in Tskhinvali prison under suspicious circumstances. Ossetian side reported that Archil Tatunashvili died with heart failure in a Tskhinvali hospital; however, Tatunashvili's family strictly demanded a further investigation of the incident (Agenda.ge 2019a). The United States and the European Union immediately called on Moscow to return Tatunashvili's corpse to his family. The Red Cross and the Georgian Orthodox Church were also involved in negotiations with Russia. The Catholicos-Patriarch of All

Georgia, Ilia II asked the Russian Patriarch Kirill for help in the name of common religion – Christianity (Orthodox Christianity 2018).

On June 21, 2018, at the Geneva meeting, the Georgian delegates have again called on Russia to transfer the internal organs of Archil Tatunashvili to the Georgian side for a detailed examination of the incident. In response to this, Russia's deputy foreign Minister Grigory Karasin declared that Georgia's dispute with South Ossetia should be resolved between Tbilisi and Tskhinvali only (Ministry of foreign affairs of Georgia 2018).

On March 10, 2019, a 29-year-old Georgian citizen, Irakli Kvaratskhelia was detained by Russian 'border guards' for illegally entering Abkhazia. Kvaratskhelia was taken to a Russian Federal Security Service office near the district of Gali where he died under suspicious circumstances. As reported by Abkhaz officials, Kvaratskhelia committed suicide while in detention. However, Georgian authorities and media remained rather Kolosok and Myroshnechenko skeptical of 'this version of events'. As it was reported by Kvaratskhelia's family and his acquaintances Irakli Kvaratskhelia could be fatally beaten and killed by Russian occupants (Agenda.ge 2019a).

On November 15, 2019, Vazha Gaprindashvili is a well-known Georgian doctor, president of the Association of Orthopedists and Traumatologists, and a leading specialist at the 'Mediclub clinic' was detained by Russian servicemen in the Georgian-Ossetian conflict zone. Gaprindashvili was sentenced on November 15 to two months' pre-trial detention in Tskhinvali. The arrested doctor was released on December 28, 2019. According to Vazha Gaprindashvili, he wrote a petition for pardon, a day earlier, on December 27, but he did not plead guilty to the imposed charge in the petition. Other sources claimed that the so-called President of the South Ossetia Anatoly Bibilov pardoned him.

It should be highlighted that Georgia and Russia both share several International treaties fundamental objective of which is to respect international law, human rights, and fundamental freedoms. Such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the European Social Charter, the International Covenant on Civil and Political Rights (ICCPR), and others. However, The Russian Federation continuously neglects the principles of international law and strictly violates human rights and freedoms in the occupied regions of Georgia. Table 1 shows the number of detentions since 2008 for 'illegally crossing the border', recorded by the Georgian authorities.

Table 1: The number of detentions since 2008 for 'illegally crossing the border' (Source: State Security Service of Georgia 2021)

Year	South Ossetia / Tskhinvali Region	Abkhazia
2008	7	13
2009	79	91
2010	77	114
2011	140	84
2012	108	192
2013	139	393
2014	142	375
2015	163	336
2016	134	193
2017	126	52
2018	100	28
2019	86	27
From 1 st January until 16 th August 2020	37	7

According to data released by the Border Service of the Russian Federation, in Abkhazia, the number of detentions reached is increasing and most of them are ethnic Georgians. In South Ossetia people are released from detention only after paying a fine which amounts to almost RUB 2,000 (30 US Dollars) and in Abkhazia, they are released after paying almost 232 US Dollars (Juznaia 2017). Thus, the Russian Federation, which exercises illegal control of the occupied regions of Abkhazia and South Ossetia continuously disrespects the sovereignty and territorial integrity of Georgia and violates the rights of thousands of innocent civilian populations living in and beyond the occupation lines.

THE USA -RUSSIA CONTRADICTIONS OVER GEORGIA: CHALLENGES AND DIFFICULTIES

Since the early years of Georgia's independence, the USA has fully supported Georgia's democratization process and has tried to maintain stability in the region, thereby increasing the country's opportunities for further economic progress and development (Lordkipanidze 2019, 3-4). A clear illustration of the above mentioned is the great efforts made by USA President Bill Clinton to construct the Baku-Tbilisi-Ceyhan (BTC) oil pipeline in the late 1990s, which was of fundamental significance for the stabilization of the post-war Georgian economy (Bedianashvili 2018, 32-34; Bedianashvili 2017, 10-13). The BTC pipeline gave Georgia a new dimension since it has

attracted worldwide attention as a major transit corridor in the Caucasus region for energy resources (Lomia 2019, 61). The United States has shown unprecedented support for Georgia's Euro-Atlantic integration, promoting democratic principles and values in the country, implementing domestic political reforms, and replacing American capital with Russian, primarily to free Georgia from Moscow's influence. Of course, the above was in complete contradiction with Russia's long-term goals for Georgia. Scientific circles also believed that Russia would sooner or later react to the USA foreign policy course in Russia's 'backyard', and that the Kremlin would never accept the USA and the EU domination in its 'sphere of influence'. Soon it became clear that they were not mistaken.

On the contrary, Russia has actively been using not only political, economic, and military pressure on Georgia, but it also started disinformation campaigns in the occupied regions of Abkhazia and South Ossetia to spread anti-Western sentiments in public. Thus, Russia still exercises regional hegemony over the post-Soviet states through the means of employing different tactics (Tskhovrebadze 2016, 66). In addition to that, the Kremlin-initiated 'passport policy' resulted in a process of *de facto* Russification of the people in the occupied regions of Abkhazia and South Ossetia, granting Russian passports to the people living in the regions. It strictly contradicted both Georgian and Russian legislation.

The NATO Secretary-General, Jaap de Hoop Scheffer called on the Russian side to stop the hostility with Georgia and start the direct negotiation process. Thus, "bullying and intimidation are not acceptable ways to conduct foreign policy in the 21st century" (Downing 2008). Also, "Russia has invaded a sovereign neighboring state and threatens a democratic government elected by its people" (Downing 2008), declared USA President George W. Bush. In support of Bush's opinion, the Secretary of State Condoleezza Rice added: "We call on Russia to cease attacks on Georgia by aircraft and missiles, respect Georgia's territorial integrity, and withdraw its ground combat forces from Georgian soil" (Cornwerll and Plerning 2008).

Some scholars argue that the United States and Russia share the same viewpoint on terrorism and fight together to defeat radical Islamist fundamentalism since September 11, 2001 (Kiknadze 2007), however, they strictly do not share the same viewpoint to Tbilisi. The USA supports Georgia's sovereignty and territorial integrity within its internationally recognized border. On the other side of the globe, Russia still considers Georgia as an exclusive sphere of its influence and views the USA and NATO as direct enemies in the Caucasus region.


CONCLUSION

The political climate between the United States and the Russian Federation has become extremely tense since the presidency of Vladimir Putin in Russia. Numerous experts believe that a completely new stage in Russian history begins in the 2000s. This is a period when Russia's geopolitical interests were widely declared and Kremlin began an aggressive foreign policy course to eventually realize its geopolitical interests in the post-Soviet space.

The mentioned time coincided with the internal political changes in Georgia as well. In 2003, as a consequence of the 'Rose Revolution', with the great support of the United States, pro-Western charismatic leader Mikheil Saakashvili came to power that chose the western orientation as a precondition for Georgia's further development. Moreover, the USA-Russia relations have considerably deteriorated after Russia's military intervention in Georgia and recognition of Abkhazia and South Ossetia as independent states.

Following Russia's 'borderization' policy in the occupied regions of Georgia, Russian and *de facto* authorities in Abkhazia and South Ossetia constitute severe violations of human rights of the people living in and beyond the so-called Administrative Boundary Lines. Russian servicemen regularly detain people under the pretext of 'illegally crossing the border'. Villages have lost access to farmlands, orchards, graveyards, people are cut off from relatives and neighbors since the barbed-wire fences and trenches are also erected on their lands. They never receive any compensation for the violation of their fundamental rights, including the rights to live and own property in occupied territories. The latter is granted to all the people in the universe by international law.

In South Ossetia, the Russian occupational regime continues demarcation activities along with the occupied territories of Georgia. That is the administrative border that existed earlier before Georgia's independence when the country was a part of the former Soviet Union. Following the Russian-Georgian war, Georgia lost control over 150 settlements among which more than 130 settlements belong to the Tskhinvali region and more than 15 settlements belong to Kodory Valley.

Furthermore, it is important to emphasize that the Russian-Georgian war in August 2008 turned into a subject of confrontation between the USA and Russia as well. Many scholars still argue that the August war was a clear illustration of how Russia 'punished' the USA for misbehavior and it was an important message for the United States that Russia remains a dominant actor in the post-Soviet space and Moscow will not allow the USA to strengthen its position in its sphere of influence. 

REFERENCES

1. Amnesty International. (2019, July 3). Georgia: Behind Barbed Wire: Human Rights Tool of "Borderization" in Georgia. Retrieved June 15, 2020, from Amnesty International: <https://www.amnesty.org/en/documents/eur56/0581/2019/en/>
2. AGENDA.GE. (2019a, April 2). Archil Tatumashvili, Georgian brutally killed by occupying forces, would have turned 36 today. Retrieved June 15, 2020, from AGENDA.GE Time in Tbilisi: 13 Aug 2020, 15:22 : <https://agenda.ge/en/news/2019/916>
3. AGENDA.GE,. (2016, May 20). Russia denies involvement in the death of a Georgian man near ABL with Abkhazia. Retrieved June 15, 2020, from AGENDA.GE Time in Tbilisi: 13 Aug 2020, 15:17: <https://agenda.ge/en/news/2016/1220>
4. Amnesty International. (1998, July 31). Amnesty International. Retrieved June 15, 2020, from Georgia: Summary of Amnesty International's concerns: 31 July 1998, Index number: EUR 56/002/1998
5. Bedianashvili, G. (2018a). Knowledge economy, entrepreneurial activity and culture factor in modern conditions of globalization: challenges for Georgia. *Globalization & Business*, 32-37.
6. Bedianashvili, G. (2017a). Benchmarking as a research method for obtaining system knowledge of the state institutional development. *Information Models and Analyses*, 84-89.
7. Bedianashvili, G. (2017a). Formation of Knowledge Economy and Innovative Entrepreneurial Policy: Institutional Aspects. *Globalization & Business*.
8. Constitution of Georgia. (1994). Constitution of Georgia. Retrieved June 15, 2020, from parliament.ge: <http://www.parliament.ge/uploads/other/28/28803.pdf>
9. Cornwerll, S., & Plerning, S. (2008, August 8). US tells Russia to pull forces out of Georgia. REUTERS . <https://www.reuters.com/article/idINIndia-34907620080808> adresinden alındı
10. EUMM. (2019, October 7). The EUMM Monitor. Retrieved June 15, 2020, from A bulletin from the European Union Monitoring Mission in Georgia: https://eumm.eu/data/file/6486/The_EUMM_Monitor_issue_7_ENG.pdf
11. Government. (2020). Government of Georgia. Retrieved June 15, 2020, from Government of Georgia State Strategy on Occupied Territories: Engagement Through Cooperation: [http://gov.ge/files/225_31228_851158_15.07.20-StateStrategyonOccupiedTerritories-EngagementThroughCooperation\(Final\).pdf](http://gov.ge/files/225_31228_851158_15.07.20-StateStrategyonOccupiedTerritories-EngagementThroughCooperation(Final).pdf)
12. JAMnews. (2016, May 22). Giga Otkhozoria's Murder, , Georgian-Abkhaz relations becoming tense. Retrieved June 15, 2020, from JAMnews 22.05.2016 : <https://jam-news.net/giga-otkhozorias-murder/>

13. Kiknadze, T. (2007). Terrorism as a social reality. NATO SECURITY THROUGH SCIENCE SERIES E HUMAN AND SOCIETAL DYNAMICS.
14. Lomia, E. (2019a). Key Features of the US-Georgia Relations: Mutual Alliance and Strategic Partnership. International Black Sea University.
15. Lomia, E. (2020). The Evaluation of Russia's Foreign Policy Towards. *Journal of Liberty and International Affairs*, 113.
16. Lomia, E. (2021). Political Problems and Preconditions for Ethnopolitical Conflicts in Post-Soviet Georgia. *The New Economist*(15(3)).
17. Lordkipanidze, R. (2021a). Strategic Mechanisms of Economic Policy in Georgia. *The New Economist*.
18. Lordkipanidze, R. (2019a). Economic Views of two World-famous Leaders from Small Georgia-Shevardnadze and Stalin and How to Avoid Moral Amortization of Global Economic Structures. Tbilisi, General Coordinator of International Charity Scientific-Research Partnership, As E-Article, 10.
19. Lordkipanidze, R. (2021). Strategic Mechanisms of Economic Policy in Georgia. *The New Economist*(15(3)).
20. Maisaia, V., & Kareli, S. (2019). Three Seas'area Pan-Regional Security Provisions And Its Geopolitical Consequences–Security Dilemma Vs. Security Deadlock. *Ante Portas*, 63–75.
21. Maisaia, V., & Khanjaliashvili, E. (2020). Georgia's Security Environment And Combating Terrorism-New Challenges And Threat In 21st Century. *Security Science Journal*, 113–121.
22. Maisaia, V., & Mikadze, M. (2020). The Eu Defence Policy And Caucasus-Caspian Regional Security-Tracing From Crisis Management Till Stability: Georgia's Case. *Ante Portas*, 133.
23. Mgeladze, L. (2021). Regulated economic areas-hostage or survivor of regulation. *The New Economist*(15(3)).
24. Ministry of foreign affairs of Georgia. (2018). Statement by the Ministry of Foreign Affairs of Georgia on the 44th Round of Geneva International Discussions. Retrieved June 15, 2020, from Ministry of foreign affairs of Georgia: <https://mfa.gov.ge/>
25. Modebadze, V. (2015). The idea of a United Europe. Tbilisi. *The Scientific journal of Law and Economics*, 1–9.
26. Modebadze, V., & Kozgambayeva, G. (2019). Russia's Geopolitical interests in Georgia (South Caucasus and the threats coming from Moscow). *Вестник КазНУ. Серия,,* 27–31.
27. Nikoleishvili, L., & Kiknadze, T. (2020). Peculiarities Of The Phenomenon Of Political Leadership In Post-Soviet Georgia. *International Journal of Innovative Technologies in Social Science*.

28. Orthodox Christianity. (2018, March 2). Pat. Ilia Entreating Pat. Kiril's Help in Returning Body of Georgian Man Who Died in S. Ossetia. Retrieved June 15, 2020, from ORTHODOX CHRISTIANITY Tbilisi, March 2, 2018: <http://orthochristian.com/111167.html>
29. Repertoire of the Practice of the Security Council. (2009, January 1). The Situation in Georgia. Retrieved June 15, 2020, from Repertoire of the Practice of the Security Council, 2008-2009: https://www.un.org/en/sc/repertoire/2008-2009/Part%20I/Europe/08-09_Georgia.pdf
30. Report. (2009, September 1). Report Volume II 2019. Retrieved June 15, 2020, from Independent International Fact-Finding Mission on the Conflict in Georgia: https://www.mpil.de/files/pdf4/IIFFMCG_Volume_II1.pdf
31. State Security Service of Georgia. (2021, June 1). State Security Service of Georgia. Retrieved from State Security Service of Georgia: <https://ssg.gov.ge/en/>
32. Tskhovrebadze, T. (2015). Transnational Security of South Caucasus. *Journal of Social Sciences*, 40-49.
33. Tskhovrebadze, T. (2016). Glimpse of Security Architecture of Post-Soviet Space: The Soviet Legacy. *Journal of Social Sciences*, 60-69.
34. Wikipedia. (2021, June 1). Georgian–Ossetian conflict. Retrieved from Wikiedia The Free Encyclopedia: https://en.wikipedia.org/wiki/Georgian%E2%80%93Ossetian_conflict



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MINORITY RIGHTS IN CENTRAL ASIA: INSIGHTS FROM KAZAKHSTAN, KYRGYZSTAN, AND UZBEKISTAN

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Abstract: *This paper explores the state of minority rights in the three Central Asian countries of Kazakhstan, Kyrgyzstan, and Uzbekistan. These countries share a lot of similarities in terms of their post-Soviet authoritarian legacy and weakness of democratic institutions. The repressive political landscapes of the Central Asian states have taken their tolls on minority groups, leaving them discriminated against, mistreated, and severely disadvantaged. Minority rights violations range from ethnic and religious discrimination to state-sponsored homophobia. Even though the leadership changes have positively affected the state of human rights in the three countries, there is still a slow pace of reforms. Overall, domestic changes in Uzbekistan, Kazakhstan, and Kyrgyzstan have not yielded considerable results so far in terms of alleviating the plight of minority groups across these countries.*

Keywords: *Kazakhstan; Kyrgyzstan; Uzbekistan; Human Rights; Minorities; Discrimination*

INTRODUCTION

The problem of minorities has been a significant issue in international society for centuries. It has generated ongoing friction between states, led to separatism and intervention while causing devastating wars. Central Asia that appears to constitute a maze in ethnic terms has been inherently prone to ethnic conflicts. While the origins of ethnic tensions in Central Asia date back to Czarist and Soviet times, the deeply-rooted hostilities have plunged into a volatile new phase since the independence of the Central Asian states in 1991. The situation surrounding minorities is compounded by prevailing authoritarian practices across the region with all adverse effects on ethnic, religious, sexual minority groups and beyond. The authoritarian malpractices range from centralization and personalization of power to extensive crackdown on civil liberties and political freedoms, with the minority groups desperately longing for acceptance, fair treatment, and protection. The leadership changes in Uzbekistan, Kazakhstan, and Kyrgyzstan, with the leaders that position themselves as reformers engender a series of

unanswered questions about their possible implications for human rights across these countries. This paper specifically addresses the following research question: What are the major problems faced by the minority groups in Kazakhstan, Kyrgyzstan, and Uzbekistan?

RELIGIOUS RIGHTS IN CENTRAL ASIA: THE GAP BETWEEN PRINCIPLE AND PRACTICE

Central Asian countries share much in common in terms of their post-Soviet authoritarian legacy and weakness of democratic institutions. Their post-soviet transition has been marred by a series of authoritarian malpractices, ranging from centralization and personalization of power to extensive crackdown on civil liberties and political freedoms. While the three Central Asian states have signed up to major international conventions on human rights, their implementation remains a significant problem. Notably, the three countries are members of the Organization for Cooperation and Security in Europe (OSCE) with ensuing commitments to respect human rights in compliance with CSCE Helsinki Final Act 1975, The Copenhagen Document 1990, and other related OSCE documents. Moreover, Kyrgyzstan has ratified the 1995 Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States (CIS) (Lehner 2019).

Table 1: Human Rights Framework (Source: Terzyan 2021)

Human rights treaties	Kazakhstan	Kyrgyzstan	Uzbekistan
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Accession	Accession	Accession
Optional Protocol of the Convention against Torture	Ratification	Ratification	-
International Covenant on Civil and Political Rights	Ratification	Accession	Accession
Convention for the Protection of All Persons from	Accession	-	-

Enforced Disappearance			
Convention on the Elimination of All Forms of Discrimination Against Women	Accession	Accession	Accession
International Convention on the Elimination of All Forms of Racial Discrimination	Accession	Accession	Accession
International Covenant on Economic, Social and Cultural Rights	Ratification	Accession	Accession
Convention on the Rights of the Children	Ratification	Accession	Accession
Convention on the Rights of Persons with Disabilities	Ratification	Signed	Signed

A question arises as to what the current state of these commitments' fulfillment is. In terms of religious freedoms, studies show that they remain considerably restricted in Muslim-dominated Central Asian countries. One of the most vivid forms of religious discrimination in the three countries is the enforcement and application of mandatory state registration requirements for religious associations. Unregistered religious activities and private religious practice and instruction are prohibited and lead to administrative or criminal penalties (Olcott 2016).

In 2011, Kazakhstan passed a new law governing religious activities and associations with new registration requirements. Since the implementation of the law in 2012, every place of worship in Kazakhstan has had to register with the government and every piece of religious literature sold must be pre-approved. The human rights monitoring service Forum 18 reports that in 2017 Kazakhstan prosecuted and convicted 23 members of Sunni Muslim, Jehovah's Witness, Baptist, and other minority faith communities for ostensibly 'unlawful' religious activities. The crime committed in most cases was the possession of religious literature (Forum 2018). Barker (2018) notes that while governments often try to justify these oppressive laws by citing extremism; their actual goal is to control religious groups (Barker 2018). Similarly, Fradkin (2020) argues

that to justify the increasing restrictions on religious freedom, Kazakhstan's domestic discourse has shifted to prioritize 'security' as a rationale for controlling the Islamic space. Meanwhile, religious 'dissidents' are denigrated as 'extremists'. According to this narrative, extremism is caused almost exclusively by 'foreign' influences (Fradkin 2020).

During his official visit to Kazakhstan in 2014, the UN Special Rapporteur Heiner Bielefeldt noted that members of 'nontraditional' groups are treated unequally, get subjected to 'societal skepticism, suspicion and discrimination' and the 'state goes quite far in monitoring religious organizations, in particular non-traditional communities' (Marinin 2015, 12-13). He called for the abolition of compulsory registration pointing out a bunch of other significant shortcomings of the existing legislation, such as 'problematic language' vis-à-vis 'non-traditional' religious movements, vague formulation of 'religious hatred/religious extremism' as well as the overall worsening landscape of religious freedoms (Marinin 2015).

Instead of addressing the call of the Special Rapporteur as well as the recommendations made during its last Universal Periodic Review (UPR) to "undertake a thorough review of the 2011 Law on Religious Associations", throughout 2018 the country considered amendments to the law that would have imposed further restrictions and sanctions on religious teaching, proselytizing, and publications. Not surprisingly, religious groups expressed their concerns over increasingly restrictive measures. In January 2019, the government withdrew the proposed amendments from consideration but did not explain its decision (HRW 2019).

According to the Office of International Religious Freedom, "the Kazakh authorities are imposing restrictions and additional scrutiny on what the government considers 'nontraditional' religious groups, including Muslims who practice a version of Islam other than the officially recognized Hanafi school of Sunni Islam" (US Department of State 2019a). While Kyrgyzstan guarantees freedom of conscience and religion on paper, it is not uncommon for religious groups to get subjected to mistreatment and harassment by the government. The state exercises control over the Hanafi school of Sunni Islam - the largest Kyrgyz Islamic denomination and the only one that is officially recognized as 'traditional' - through a Muslim Board that appoints all clergy and religious educators (USCIRF 2017).

According to local human rights defenders, in response to the recent spread of Salafism and other fundamentalist strands of Islam, the Kyrgyz authorities have become increasingly repressive. The government's rhetoric against fundamentalist Islamic ideology has at times been strident (HRW 2018). Southern Kyrgyzstan, which is home to a large Uzbek community (up to 40 percent of the population), has seen several examples of official religious repression of local Muslim leaders. In 2010, southern Kyrgyzstan witnessed widespread ethnic violence; almost all the 450 victims were ethnic Uzbeks (USCIRF2017).

As for Uzbekistan, in 2019, the US State Department put the country into the category of those, which violate religious freedoms (Central Asian Bureau for Analytical Reporting, 2020). According to Uzbekistani civil society organizations, by August 2015, over 12,000 individuals had been imprisoned on charges of religious extremism. Throughout 2016, human rights organizations, such as Forum 1885 and Amnesty International documented other cases of arrest and imprisonment of religious dissidents on extremism charges (Equal rights Trust 2017).

Ethnic Uzbeks who converted to Christianity reportedly suffered continued discrimination, including family pressure to repudiate their new faith. Members of religious groups perceived as proselytizing, including evangelical Christians, Pentecostals, Baptists, and Jehovah's Witnesses, said they continued to face greater societal scrutiny and discrimination (US Department of State 2019b). The new government's initial stride towards delisting thousands of individuals from its blacklist of potential 'religious extremists', and its decision to invite the United Nations Special Rapporteur on freedom of religion or belief, Ahmed Shaheed, to visit the country in late 2017, seemed to move the needle. Similarly, the government's adoption of 'road map' in response to Shaheed's recommendations the following year provided grounds for optimism (Maenza and Turkely 2020).

Overall, religious freedoms remain severely restricted across Kazakhstan, Kyrgyzstan, and Uzbekistan, with the governments controlling religious narratives not least through suppressing pluralism.

THE PLIGHT OF MINORITIES: THE PATTERNS OF DISCRIMINATION IN CENTRAL ASIA

The three Central Asian countries are home to various ethnic groups. Since the collapse of the USSR, all three countries adopted legislation, policies, and ideologies that confirmed their status as emerging nation-states. Meanwhile, they have inherited the Soviet attitudes towards minorities, thus leaving them disadvantaged and discriminated against (Equal Rights Trust 2017, 71-72). The current patterns of discrimination, whether religious, ethnic, or linguistic are vivid manifestations of the Soviet legacy. Even though the three countries have acceded to or ratified the basic human rights instruments and thereby assumed non-discrimination obligations along ethnic lines, there are considerable gaps between principles and practices.

The most serious pattern of ethnic discrimination in the region is that of inter-ethnic violence and associated hate speech (Equal rights Trust 2017, 85). The most extreme manifestations of such violence occurred in Kyrgyzstan, but lesser forms of abuse have also occurred in Kazakhstan and other parts of the region. Kyrgyzstan's southern region considerably differs in terms of its political culture from the north, with considerable intolerance for minorities. The interethnic violence in Southern Kyrgyzstan,

which occurred chiefly in Osh and Jalalabad, in June 2010 cost around 500 lives and wounded thousands. According to the United Nations and other international organizations, 400,000 refugees were displaced because of the pogroms and over 111,000 people fled across the border to Uzbekistan (International Crisis Group 2012). Although Uzbeks were the primary targets of these clashes, they made up the majority of those, who were detained and prosecuted in the aftermath of the riots (CERD 2018).

Notably, the Kyrgyz government keeps denying justice to the victims of ethnic violence. The Human Rights Watch notes that the government “took no steps to review the torture-tainted convictions delivered in its aftermath” (HRW 2017).

To account for the main causes of inter-ethnic tensions, Rezvani (2013) focuses on the legacy of the Soviet ethno-political system along with Uzbek trans-border dominance and spatial factors, including specifically the mosaic type ethno-geographic configuration (Rezvani 2013, 73-77). The authoritarian regimes have had a strong tendency of resorting to repressive measures when addressing inter-ethnic strives, including ethnic cleansing and forced migration. However, these factors would not necessarily cause a conflict if the ethnicities were depoliticized. Therefore, it is essential to embrace a civic model of nationhood wherein all citizens, irrespective of their ethnicity, religion, or language, have equal rights (Rezvani 2013).

Even a decade after the bloody events of 2010, ethnic Uzbeks remain quite vulnerable in Southern Kazakhstan. According to Human Rights Measurement Initiative (HRMI), Kyrgyzstan scores 3.9 out of 10 in terms of civil and political rights, with the ethnic groups identified as being particularly at risk of violations. HRMI also reports that the Uzbek population is vulnerable to torture and ill-treatment in Kyrgyzstan (HRMI 2019). While Kyrgyzstan has seen the most severe forms of interethnic tensions, the neighboring countries are not devoid of such problems. Kazakhstan is the only country that has never had a majority of the titular national group during Soviet times. Not surprisingly, the authorities have consistently strived to reinforce the Kazakh identity through increasing the Kazakh population and elevating the Kazakh language as a part of the policy of “Kazakhization” (Matuszkiewicz 2013).

In 2009, President Nazarbayev adopted the so-called Doctrine of National Unity aimed at strengthening inter-ethnic harmony. Three key principles were singled out in the doctrine: 1. one country, one destiny, 2. various origins, equal opportunities, and 3. development of a national spirit (Melich and Adibayeva 2013, 270). Overall, while the government’s discourse tends to focus on the concept of an inclusive civic state, it is not uncommon for ethnic minorities to face discrimination. Ethnic tensions escalated in February 2020, when hundreds of pogromists attacked the Dungan villages. At least 10 people were killed, and dozens wounded because of a brawl between Dungans (members of a local Muslim ethnic minority of Chinese origin) and Kazakh police (Aljazeera 2020). Notably, little has been done to conduct a thorough investigation.

On the contrary, in April 2020 the representatives of the Dungan minority got subjected to arbitrary detentions and ensuing torture (Aljazeera 2020). Dave (2004) notes that the absence or weakness of ethnic leaders capable of creating a support base within their ethnic communities is a major problem faced by the ethnic groups in Kazakhstan. Essentially, leaders of ethnic communities are not the actual representatives and 'voices' of their communities. Rather, they are mostly appointed or backed by pro-regime forces, with the view to showcasing the 'multiethnic' composition of the government (Dave 2004, 20).

Unlike Kyrgyzstan and Kazakhstan, Uzbekistan has not witnessed ethnic clashes since its independence. Islam Karimov's regime was quick to take legislative and policy measures aimed at nipping in the bud ethnic tensions. Along with legislative measures the government created a special group of state-sponsored NGOs to ensure the representation of the country's ethnic minorities (Equal rights Trust 2017).

In 1992, Uzbekistan founded the institution of the Republican Inter-ethnic Cultural Centre. Currently, there are over 140 national and cultural centers - headed by pro-regime figures. Even though large ethnic minorities are represented by these centers, it is not uncommon for them to face discrimination based on their perceived loyalty to the ruling regime. Namely, while some Tajik Cultural Centers that are loyal to the government had no problems with registration, the applications of others got denied (Equal Rights Trust 2016). In terms of language-related issues, it is noteworthy that particularly in Kazakhstan, where the ethnic Kazakh population constitutes less than two-thirds of the (63%) population, the policy 'Kazakhization' has strived to promote Kazakh identity not least through using the Kazakh language. The use of other languages is a significant concern in terms of ethnic minorities' access to education. In 2014, the Committee on the Elimination of Racial Discrimination (CERD) expressed concerns over the accessibility of minority language schools (CERD 2014). In 2010, civil society organizations reported that an increasing number of minority language schools were being shut down, with no new ones opened since Kazakhstan's independence in 1991. Meanwhile, Kazakh language schools would consistently grow in numbers (Equal Rights Trust 2016, 138-139).

The language discrimination in Kyrgyzstan became particularly acute in the aftermath of the 2010 ethnic clashes. Many Uzbek-language media owners were forced to flee Kyrgyzstan for security reasons. Before the 2010 conflict, there were three Uzbek-language television stations and two Uzbek-language newspapers. Meanwhile, after the ethnic clashes, one of the television stations never re-opened, while the other along with the newspapers were taken over by ethnic Kyrgyz and started using the Kyrgyz language (Equal Rights Trust 2016, 156-157). The HRC notes that many schools in Osh and Jalal-Abad that formerly provided education in Uzbek currently teach only in Kyrgyz. Moreover, some of them no longer receive government funding that is aimed at providing classes in Uzbek (OSCE 2013).

In Uzbekistan, where the Tajiks make up the largest ethnic minority, the Tajik language is restricted in terms of its availability in media and education. Moreover, while Karakalpak and Uzbek are both official languages in the Karakalpak autonomous republic of Uzbekistan, the government has been recently replacing the Karakalpak names of administrative divisions with Uzbek language ones (Equal Rights Trust 2017, 89).

As for sexual minority rights, they are among the most discriminated and disadvantaged groups in traditional Central Asian societies. In Uzbekistan, homosexuality is officially illegal and punishable by up to three years in jail. Following the country's Universal Periodic Review in 2018, the government rejected recommendations related to decriminalization of LGBTI status and called LGBTI issues "irrelevant to Uzbek society" (US Department of State 2019b). The LGBT community seems to enjoy more freedoms in Kazakhstan, even though violence and discrimination against sexual minority groups keep prevailing.

Meanwhile, in Kyrgyzstan violence, discrimination, and hate crimes based on sexual orientation and gender identity permeate every section of the society (Submission to the UN Universal Periodic Review 2016).

The leadership changes in Central Asia seemed to open a window of opportunity in terms of improving the state of human rights across the region. Nazarbayev's successor Kassym-Jomart Tokayev has positioned him as a 'reformer' and offered a dialogue with civil society (Inauguration speech 2019). He has pledged to liberalize the restrictive legislation governing the freedom of assembly (Radio Azattyk 2019).

Nevertheless, as Hugh Williamson, Europe, and Central Asia director at Human Rights Watch, notes "despite a rhetoric of change, Kazakhstan's political transition looks like a human rights stagnation (...)" (HRW 2020). Thousands of protesters have been arrested since Tokayev's election and prominent government critics remain unjustly in prison (HRW 2020).

Former president Nazarbayev still maintains 'broad, lifetime authority' over a range of government functions. As the US State Department reports, "unlawful or arbitrary killing by or on behalf of the government (...) substantial interference with the rights of peaceful assembly and freedom of association; restrictions on political participation" (US Department of State 2019a), remain significant human rights issues in Kazakhstan. Since rising to power Uzbekistan's President Mirziyoyev has carried out a series of reforms aimed at improving the state of human rights, not least through the release of several human rights defenders and journalists. As an integral part of his reform agenda, Mirziyoyev shut down the notorious Jaslyk prison (Economist 2019). Still, thousands of people, mainly peaceful religious believers, remain in prison on false charges, and there is no genuine political pluralism.

As for Kyrgyzstan, even though it has gained the reputation of the 'island of democracy' the frequent revolutions and ensuing turbulence suggest that it can be fairly


treated as an 'island of instability'. The continued suppression of ethnic minorities remains a major concern that needs to be addressed by the new authorities.

CONCLUSION

Even though Kazakhstan, Kyrgyzstan, and Uzbekistan have assumed a series of international obligations and duties to respect, protect, and fulfill human rights, there are still huge gaps between principles and practices in the three Central Asian countries.

Minority groups, whether ethnic or sexual, remain discriminated against, mistreated, and disadvantaged. The problems of ethnic discrimination are particularly acute in Kyrgyzstan, fraught with massive violations of the Uzbek minority rights. The widespread discrimination against ethnic minorities is not uncommon in neighboring Kazakhstan and Uzbekistan. The so-called policy of 'Kazakhization' seems bound to further disadvantage the ethnic and religious minorities across Kazakhstan. The situation is not much different in Uzbekistan, plagued by erosion of civil liberties, suppression of dissent, and pluralism. Notably, while violating the rights of religious minorities, the Uzbek authorities have invoked as justification the need to counter 'religious extremism'. Meanwhile, the restrictive legislation and repressive measures are bound to further fuel religious hatred and radicalize peaceful religious adherents.

Severe violations of LGBT rights are prevalent in all three countries. Even though the LGBT climate in Kazakhstan is better than in the rest of Central Asia, discrimination and violence against sexual minorities remain rampant. Even though the leadership changes have positively affected the state of human rights in the three countries, there is still a slow pace of reforms.

Overall, domestic changes in Uzbekistan, Kazakhstan, and Kyrgyzstan have not yielded considerable results so far in terms of alleviating the plight of minority groups across these countries. 

REFERENCES

1. Aljazeera. 2020. Ethnic violence blows a hole in Kazakhstan's narrative of tolerance. Accessed February 24. <https://www.aljazeera.com/news/2020/2/10/ethnic-violence-blows-hole-in-kazakhstans-narrative-of-tolerance>.
2. Barker J. 2018. Responding to Religious Repression in Central Asia. Religious Freedom Institute. Accessed February 24, 2021. <https://www.religiousfreedominstitute.org/blog/responding-to-religious-repression-in-central-asia>.
3. BTI. 2020. Kazakhstan: 2020 Country Report. Accessed February 24, 2021. <https://www.bti-project.org/en/reports/country-report-KAZ-2020.html>.
4. Central Asian Bureau for Analytical Reporting. 2020. Uzbekistan: Towards Religious Freedom. Accessed February 24, 2021. <https://cabar.asia/en/uzbekistan-towards-religious-freedom>.
5. CERD. 2013. Concluding Observations: Kyrgyzstan. Retrieved February 24, 2021 from https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD/C/KGZ/CO/5-7&Lang=En
6. CERD. 2014. Concluding observations on the combined sixth and seventh periodic reports of Kazakhstan, UN Doc. CERD/C/KAZ/CO/6-7, 14 March 2014, Retrieved February 24, 2021 from <https://digitallibrary.un.org/record/772804?ln=ru>.
7. CERD. 2018. UN International Convention on the elimination of all forms of Racial Discrimination (2018). Retrieved February 24, 2021 from <https://www.ohchr.org>.
8. Dave, B. 2004. Minorities and Participation in Public Life: Kazakhstan, presented in seminar Minority Rights: Cultural Diversity and Development in Central Asia,
9. Economist (2019). Uzbekistan's new president closes Jaslyk prison camp. Accessed March 15, 2021. <https://www.economist.com/asia/2019/08/08/uzbekistans-new-president-closes-jaslyk-prison-camp>.
10. Edel, M. and Josua, M. 2017. How Authoritarian Rulers Seek to legitimize Repression: Framing Mass Killings in Egypt and Uzbekistan, *GIGA Working papers*, 299, German Institute of Global and Area Studies (GIGA), Hamburg.
11. Equal Rights Trust. 2016. After the Padishah: Addressing Discrimination and Inequality in Uzbekistan, The Equal Rights Trust Country Report Series 8 London.
12. Equal Rights Trust. 2016. Looking for Harmony: Addressing Discrimination and Inequality in Kyrgyzstan. The Equal Rights Trust Country Report Series: 9 London, December 2016.

13. Equal Rights Trust. 2017. Legacies of Division: Discrimination on the Basis of Religion and Ethnicity in Central Asia. Accessed February 24, 2021. <https://www.equalrightstrust.org/sites/default/files/ertdocs/Legacies%20of%20Division.pdf>.
14. Forum 18. 2018. Kazakhstan: Six Await Trial; Cancer Sufferer not Freed. Accessed February 24, 2021. https://www.forum18.org/archive.php?article_id=2345
15. Fradkin, R. 2020. Changes in how Kazakhstan's authorities manage Islam may be undermining the country's fragile ethnic harmony. Accessed February 22, 2021. <https://eurasianet.org/perspectives-how-kazakhstan-is-jeopardizing-ethnic-cohesion>
16. HRMI. 2019. Kyrgyzstan's Civil and Political Rights Scores. Accessed February 24, 2021. <https://humanrightsmmeasurement.org/ethnic-violence-and-human-rights-in-kyrgyzstan/>.
17. HRW. 2017. Events of 2016: Kyrgyzstan. Accessed February 24, 2021. <https://www.hrw.org/ru/world-report/2017/country-chapters/297713>.
18. HRW. 2018. "We Live in Constant Fear": Possession of Extremist Material in Kyrgyzstan. Accessed February 24, 2021. <https://www.hrw.org/>.
19. HRW. 2019. HRW Submission to the Universal Periodic Review of Kazakhstan. Accessed February 24, 2021. <https://www.hrw.org/news/2019/10/01/hrw-submission-universal-periodic-review-kazakhstan>.
20. HRW. 2020. Central Asia: Reform Pledges Yet to Materialize. Accessed February 24, 2021 from <https://www.hrw.org/news/2020/01/14/central-asia-reform-pledges-yet-materialize>.
21. Inauguration Speech. 2019. Accessed January 29, 2021. http://www.akorda.kz/ru/speeches/internal_political_affairs/in_speeches_and_addresses/vystuplenie-kasym-zhomarta-tokaeva-na-oficialnoi-ceremonii-vstupleniya-v-dolzhnost-izbrannogo-prezidenta-respubliki-kazahstana.
22. International Crisis Group. 2012. Kyrgyzstan: Widening Ethnic Divisions in the South. *Asia Report*, 222.
23. International Federation for Human Rights. 2016. Kyrgyzstan: At a Crossroads: Shrink or Widen the Scene for Human Rights Defenders. The Observatory for the Protection of Human Rights Defenders. Accessed February 24, 2021. <https://www.fidh.org/IMG/pdf/kyrgyzstanobsang2016web.pdf>.
24. Lehner, O. 2019. Respecting Human Rights in Central Asia: Will This Stabilize or Destabilize the Region? *Security and Human Rights*, 20(1): 48–55.
25. Maenza, N. and Turkely, N. 2020. Uzbekistan Must Stay on the Path of Religious Freedom Reform. *The Diplomat*. Accessed February 24, 2021. <https://thediplomat.com/2020/07/uzbekistan-must-stay-on-the-path-of-religious-freedom-reform/>.

26. Marinin, S. 2015. State Regulation of Religion in Kazakhstan: Reconsideration of Approaches. OSCE Academy, *Norwegian Institute of International Affairs*, 23, pp. 1-19.
27. Matuszkiewicz, R. 2013. How to Develop in a Sustainable Way: Some Problems Related to Social Cohesion in Kazakhstan. *Economic and Environmental Studies*, 13(2):199-213.
28. Melich, J. and Adibayeva, A. 2013. Nation-Building and Cultural Policy in Kazakhstan. *European Scientific Journal*, 2.
29. Melvin, N. 2008. *Engaging Central Asia: The European Union's New Strategy in the Heart of Eurasia*. Brussels: Centre for European Policy Studies.
30. Olcott, M. B. 2016. Religion and security in Central Asia: Recommendations for the next US administration. *The Review of Faith & International Affairs*, 14(2).
31. OSCE. 2013. OSCE High Commissioner on National Minorities, in Kyrgyzstan, Discusses Language and Education Policies. Accessed February 24, 2021. <http://www.osce.org/hcnm/109037>.
32. Radio Azattyk. 2019. Дваразныхмитингаза политическиеперемены [Two different rallies for political change], 30 June 2019, Retrieved February 24, 2021 from <https://rus.azattyq.org/a/kazakhstan-rallies-in-almaty-and-nur-sultan/30028339.html>.
33. Rezvani, B. 2013. Understanding and Explaining the Kyrgyz–Uzbek Interethnic Conflict in Southern Kyrgyzstan. *Anthropology of the Middle East*, 8(2), pp. 60-81.
34. Staberock, G. 2005. A Rule of Law Agenda for Central Asia. *Essex Human Rights Review*, 2(1).
35. Submission to the UN Universal Periodic Review. 2016. Kyrgyzstan: Human Rights Violation of LGBT. Retrieved February 24, 2021 from <https://ilga.org/wp-content/uploads/2016/02/Shadow-report-15.pdf>.
36. Terzyan A. 2021. The State of Human rights in Kyrgyzstan, Kazakhstan, and Uzbekistan: Principles vs. Practices, Modern Diplomacy. Retrieved March 28, 2021 from <https://moderndiplomacy.eu/2021/03/13/the-state-of-human-rights-in-kyrgyzstan-kazakhstan-and-uzbekistan-principles-vs-practices/>.
37. US Department of State. 2019. 2019 Country Reports on Human Rights Practices: Kyrgyz Republic, Retrieved February 24, 2021 from <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/kyrgyzstan/>.
38. US Department of State. 2019. 2019 Country Reports on Human Rights Practices: Uzbekistan. Retrieved February 24, 2021 from <https://uz.usembassy.gov/2019-country-reports-on-human-rights-practices-uzbekistan/>.
39. USCIRF. 2017. USCIRF Annual Report 2017: Uzbekistan. Retrieved February 24, 2021 from <https://www.uscifr.gov/>.

40. USCIRF.2017.USCIRF Annual Report 2017: Kyrgyzstan. Retrieved February 24, 2021 from <https://www.uscifr.gov/>.
41. USIRF. 2019. 2019 Report on International Religious Freedom: Kazakhstan. Retrieved February 24, 2021 from <https://www.state.gov/reports/2019-report-on-international-religious-freedom/kazakhstan/>.
42. Zhovtis, E. 2007. Democratisation and Human Rights in Central Asia: Problems, Development Prospects and the Role of the International Community. *Centre for European Policy Studies*, 134:1-11.



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REFOULING ROHINGYAS: THE SUPREME COURT OF INDIA'S UNEASY ENGAGEMENT WITH INTERNATIONAL LAW

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Abstract: *The complex relationship between international and municipal law has been the bone of significant scholarly contention. In the Indian context, despite a formal commitment to dualism, courts have effected an interpretive shift towards monism by espousing incorporation of international law. The case of Mohammad Salimullah v. Union of India, which involves the issue of deportation of Rohingya refugees from India, represents a challenge in this regard owing to the lack of clarity as to India's obligations under the principle of non-refoulement. The paper uses the Supreme Court's recent interim order in the said case as a case study to examine India's engagement with international law. It argues that the order inadequately examines the role of international law in constitutional interpretation and has the unfortunate effect of 'refouling' Rohingyas by sending them back to a state where they face imminent persecution.*

Keywords: *Rohingyas; Non-Refoulement; Constitution; International Law; Refugees*

INTRODUCTION

The historical divergence amongst jurists on the question of the relationship between international and municipal law led to the emergence of two rival theories, namely, monism and dualism. As per the dualist view, international law does not transform into municipal law until and unless the former is adopted as valid law through the regular mode of lawmaking by the state (Ratnapala 2013, 93). On the other hand, monism views international law as being automatically incorporated into the domestic legal order, with there being no need for additional authorization by the state (Chandra 2017, 27). In the modern context, these theories are regarded as unsatisfactory. (Bogdandy 2008, 400). Rather, "[i]t is actual practice, illustrated by custom and by treaty,

that formulates the role of international law, and not formalistic structures, theoretical deductions or moral stipulations" (Shaw 2017, 97). The role of international law within the municipal legal system is significantly more complicated than that of municipal law in the international sphere (Shaw 2017, 103). For instance, to what extent, if at all, should domestic courts place reliance on international law to interpret the constitution? Regrettably, the role of international law in the realm of Indian constitutional interpretation is "understudied and under-theorized" (Gautam 2019, 29). The Constitution of India refers to the state's engagement with international law "only in the vaguest terms" (Shaw 2017, 130). Whilst India's apex court has formally proclaimed India to be a dualist country, there is a significant divide between theory and practice (Chandra 2017, 44). Thus, the role of international law in domestic constitutional adjudication remains a contested domain.

The case of *Mohammad Salimullah v. Union of India* (2017) (hereinafter: *Mohd. Salimullah*) poses some interesting doctrinal and methodological questions in this regard (Gautam 2019, 32). *Mohd. Salimullah* is a public interest litigation filed before the Supreme Court of India (hereinafter: the Court) seeking to prevent the deportation of 40,000 Rohingya refugees in India. Whilst the principal plea remains pending, the Court passed an interim order, on 8 April 2021, allowing the deportation of Rohingya refugees back to Myanmar so long as "the procedure prescribed for such deportation is followed" (*Mohd. Salimullah v. Union of India-Interim Order* 2021). This case raised the issue of whether the principle of non-refoulement, which essentially entails that "no refugee should be returned to any country where he or she is likely to face persecution, other ill-treatment or torture" (Goodwin-Gill and McAdam 2007, 201), can be read into the provisions of constitutionally guaranteed fundamental rights. Thus, it presents an opportunity to investigate the Court's application of international law in domestic constitutional adjudication. To that end, Part 2 of the paper provides a conspectus of the Court's jurisprudence concerning the use of international law for constitutional interpretation. Part 3 delves into the principle of non-refoulment and situates it within the international and domestic legal framework. Part 4 embarks on an analysis of the recent interim order in *Mohd. Salimullah*. Part 5 concludes with remarks about the legal status of the principle of non-refoulment in India and its larger implications for India's engagement with international law.

THE SUPREME COURT OF INDIA'S USE OF INTERNATIONAL LAW IN CONSTITUTIONAL INTERPRETATION

The Constitution of India does not delineate the relationship of municipal law in the state with international law (Chandra 2017, 30). Primarily, Articles 51, 246, and 253 of the Constitution of India outline its engagement with international law (Hegde 2013, 70). Article 51 (c) enjoins the state to "foster respect for international law and treaty

obligations". However, Article 51 (c) is one of the Directive Principles of State Policy, which whilst "fundamental in the governance of the country" (Constitution of India, Article 37), is non-justiciable and merely cast a duty on the State to apply them in the process of lawmaking. Thus, the fulfillment of the mandate of Article 51 (c) rests squarely on implementation through legislation (Hegde 2013, 68). Under Article 246, the distribution of legislative power between Parliament and the state legislatures is specified through three lists including the Union List, which falls within the sole purview of Parliament. Entry 14 in the Union List deals with entering into treaties and agreements with foreign countries and implementation of such treaties, conventions, and agreements. Article 253 of the Constitution provides for such implementation by endowing Parliament with the power to make laws for the whole or any part of India for the implementation of any treaty, agreement, or convention as well as decisions made at international conferences, associations, or other bodies whereas Article 73 of the Constitution provides that "the powers of the Union Executive are co-terminus with those of Parliament" (Chandra 2017, 32). A joint reading of Articles 253 and 73 of the Constitution recognizes treaty-making as an executive function (Hegde 2013, 70). That said, a treaty entered into by the executive does not transform into municipal law and cannot be implemented unless Parliament enacts a law under Article 253 (*State of West Bengal v. Kesoram Industries Ltd.* 2005). Therefore, from a textual perspective, treaty law is not applicable in India in the absence of appropriate domestic legislation to that effect (Chandra 2017, 33). However, in actual practice, the constitutional courts have incorporated and internalized several norms of international law (Rajamani 2016, 145). It has been argued that, over the years, the Court has effected a shift from 'transformation' towards 'incorporation', i.e. from a dualist to a monist position (Chandra 2017, 40).

In the case of *In Re: Berubari Union and Exchange of Enclaves* (1960), the Court held that the treaty-making power of the executive must be exercised by what the Constitution contemplates and subject to the limitations imposed by it. Subsequently, in *Maganbhai Shwarbhai Patel v. Union of India* (1970), the Court noted that legislation giving effect to treaty obligations is necessitated in cases where the treaty operates to restrict justiciable rights or modifies municipal law. The Court adhered to this "transformation doctrine framework" until its judgment in *Gramophone Company of India v. Birendra Bahadur Pandey* (1984) (*Gramophone Company*), wherein it recognized the doctrine of incorporation by holding that the rules of international law are incorporated into the domestic legal framework unless they conflict with an Act of Parliament (Hegde 2013, 72). Thus, owing to *Gramophone Company*, "[i]nternational law move[d] from being inapplicable unless legislatively internalized to being applicable unless legislatively resisted" (Chandra 2017, 41). Subsequently, in *Vishaka v. State of Rajasthan* (1997), it was held that international conventions and norms are to be read into the provisions of fundamental rights of the Constitution of India, in case of a void in the domestic legal framework, provided there is no inconsistency between them.

This judgment forms part of a larger trend in common law jurisdictions, referred to as 'creeping monism', whereby judges utilize unincorporated human rights treaties to interpret domestic law (Rajamani 2016, 148). Subsequently, in *Shatrughan Chauhan v. Union of India* (2014), the Court relied on the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) and held that international covenants to which India is a party form a part of the domestic legal framework unless they conflict with a specific law in force. Concerning customary international law, in *Vellore Citizens Welfare Forum v. Union of India* (1996), the Court held that once a principle is accepted as being a part of customary international law, there would be no difficulty in accepting the same as a part of municipal law. Thus, despite categorically stating that "India follows the doctrine of dualism and not monism" in *Bhavesh Jayanti Lakhani v. State of Maharashtra* (2009), the Court has displayed a shift from dualism to monism (Chandra 2017, 44).

NON-REFOULMENT AND INDIA

The principle of non-refoulement finds articulation in Article 33 of the Convention Relating to the Status of Refugees, 1951 (hereinafter: the Refugee Convention, 1951). Vide Article 1 of the Refugee Convention, 1951, Article 33 applied only to individuals affected by events occurring in Europe before 1 January 1951. Subsequently, Article 1 of the Protocol Relating to the Status of Refugees, 1967 (hereinafter: the Refugee Protocol, 1967) abolished these temporal and geographical limitations for almost all signatory states (Hathaway 2005, 97). However, India is not a signatory to either of these instruments. India also does not have a domestic law or policy dealing with the status of refugees on Indian soil, with there being no official definition of refugee despite the existence of numerous legislations regulating migrants such as the Passport Act, 1967, the Foreigners Act, 1946, and the Foreigners Order, 1948 (Patnaik and Siddiqui 2018, 4). Thus, recourse must be had to human rights treaties and customary international law.

Article 14 of the UDHR provides that all individuals have the right to seek and enjoy asylum from persecution. Article 6 of the ICCPR protects the right to life whereas Article 7 provides for the right against torture. Article 3 of the Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, 1997 (hereinafter: CAT) states that no person shall be expelled, returned, or extradited to a state where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. Article 16 of the International Convention on Protection of All Persons Against Enforced Disappearance (ICPPED) states that no person shall be, *inter alia*, returned (refouled) to a state where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.

Of these, India has ratified the UDHR and the ICCPR whereas it is a signatory to the CAT and ICPPED. Concerning Article 14 of the UDHR, it has been argued that (i) the same deals with the right to enjoy asylum and not the right to be granted asylum, and (ii) the drafting history of the provision does not provide for a principle akin to non-refoulement (Gautam 2019, 50). Nonetheless, Article 7 of the ICCPR has been interpreted as casting an implied prohibition on refoulement (Goodwin-Gill and McAdam 2007, 209). The relevant provisions of the ICPPED and CAT also create a qualified duty of non-refoulement that is contingent upon the existence of substantial grounds for believing that the person would be subject to enforced disappearance and torture, respectively. It has been argued that the drafting history of the ICPPED and the CAT reveals that the relevant provisions thereof place reliance upon Article 33 of the Refugee Convention, 1951 and that India's non-signing of the same may be taken as an implied reservation to every non-refoulement provision in every international instrument after the Refugee Convention, 1951 (Gautam 2019, 50-51). However, whilst approaching the issue of implied reservations, it is pertinent to note that Article 23 (1) of the Vienna Convention on the Law of Treaties states that a reservation, an express acceptance thereof, and an objection thereto must be formulated in writing and communicated to the contracting states and other States entitled to become parties to the treaty.

In the *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (1969), for determining the existence of a rule of customary international law, the International Court of Justice stressed the existence of "extensive and virtually uniform" state practice coupled with "a general obligation that a rule of law or legal obligation is involved", i.e. *opinio juris*. The principle of non-refoulement first appeared in an international instrument in Article 3 of the Convention relating to the International Status of Refugees, 1933 (Goodwin-Gill and McAdams 2007, 202). Subsequent years witnessed the adoption of the Provisional Arrangement concerning the Status of Refugees coming from Germany, 1936, and the Convention concerning the Status of Refugees coming from Germany, 1938. The former was signed by seven states and the latter was ratified only by three states (Goodwin-Gill and McAdams 2007, 202). The Refugee Convention, 1951, was "a revision and consolidation of previous international agreements relating to the status of refugees" (Labman 2010, 2). Arguably, the scant ratification of the previous international instruments implies that non-refoulement was not a pre-existing principle of customary international law before 1951 and that the principle was codified and "elevated to the status of an obligatory norm" by the Refugee Convention, 1951 (Gautam 2019, 61). If this view were to be accepted, then the temporal and geographical limitations of the Refugee Convention, 1951 must be considered and the Refugee Protocol, 1967 may instead need to be viewed as the starting point of the universalization of the principle of non-refoulement. It is worth noting that "when a treaty-based norm stipulates a broadly

embraced sense of obligation and general practice among states in general (in particular, among non-party states), a cognate customary international legal obligation emerges" (Hathaway 2005, 365). In this regard, it becomes relevant that the Refugee Protocol, 1967 was followed by subsequent human rights instruments, i.e. the ICCPR, the ICPPED, the CAT, etc. embodying the principle of non-refoulement. As of February 2003, taking into account the Refugee Convention, 1951, the Refugee Protocol, 1967, the CAT, the ICCPR, and other instruments including regional conventions, 170 of the then 189 United Nations (UN) Member States were party to at least one or more conventions that embodied non-refoulement as an essential component (Lauterpacht and Bethlehem 2003, 147). Furthermore, of the remaining nineteen Member States, seven were members of the UN when the Declaration on Territorial Asylum was unanimously adopted by the UN General Assembly on 14 December 1967 whereas there was found to be no suggestion of opposition to the principle from the other twelve Member States (Lauterpacht and Bethlehem 2003, 147). The same does lend support for the existence of non-refoulement as a rule of customary international law.

Scholarly opinion on the issue is still divided, with there being arguments against non-refoulement being considered a part of customary international law on the grounds, *inter alia*, that: (i) refoulement remains a stark reality for refugees across the world, (ii) merely because "most states have accepted some kind of non-refoulement obligation, applying in at least some cases and contexts, it cannot be concluded that there is a universally applicable duty of non-refoulement owed to refugees by all states, and (iii) the nature of duties of non-refoulement being variable, there is no basis for a common *opinio juris* (Hathaway 2005, 363-365). Regardless, a robust case can be made for non-refoulement constituting a norm of customary international law, and the same warrants scrutiny by the Supreme Court of India when considering the issue of deportation of Rohingya refugees.

THE ROHINGYA CRISIS AND THE SUPREME COURT'S INTERIM ORDER IN *MOHD. SALIMULLAH*

A violent crackdown by Myanmar's army compelled hundreds of thousands of Rohingyas, a Muslim ethnic minority, to flee their homeland and cross the border into Bangladesh in 2017 (BBC 2020). Whilst the majority of Rohingyas have not made it past Bangladesh, there are 40,000 Rohingya refugees in India (Gibbens 2017). In response to the exodus, the Government of India issued an order directing state governments to "sensitize all the law enforcement and intelligence agencies for taking prompt steps in identifying the illegal immigrants and initiate the deportation processes expeditiously and without delay" (Government of India, Ministry of Home Affairs, Letter to Chief Secretaries: Identification of illegal immigrants and monitoring thereof 2017). Mr. Kiren Rijiju, the Minister of State for Home Affairs stated that as far as the Indian government

was concerned, the Rohingyas were illegal immigrants with no basis to live in India and that any illegal immigrant would be deported. Furthermore, in response to the United Nations High Commissioner for Refugees issuing identity cards to 16,500 Rohingyas, Mr. Rijiju stated that whilst the government cannot stop the Rohingyas from registering, India was not a signatory to the Refugee Convention, 1951 (Reuters 2017). This stance of the Government of India prompted the filing of the writ petition in *Mohd. Salimullah*, with the principal challenge still pending adjudication (Parthasarathy 2021).

The petitioners' case was that the proposed deportation would: (i) constitute a violation of the right to equality under Article 14 and the right to life and personal liberty under Article 21, read with Article 51 (c), and (ii) amount to a breach of India's obligations under international law, specifically those of the principle of non-refoulement (Brief for the petitioners, *Mohd. Salimullah* 2017). The state sought to defend its decision on three grounds: (i) the subject matter of the petition lying primarily in the executive domain, (ii) the state possessing intelligence suggesting links between several Rohingya immigrants and terror or extremist organizations, and (iii) India not being a signatory to the Refugee Convention, 1951 or Refugee Protocol, 1967 (Gautam 2019, 31-32).

On 6 March 2021, the Jammu and Kashmir police detained around 170 Rohingyas in preparation for their deportation to Myanmar (Nair 2021), prompting the filing of an interim application on 11 March 2021 in *Mohd. Salimullah* (Press Trust of India 2021). On 8 April 2021, the Court allowed the deportation of the Rohingyas detained in Jammu subject to the procedure prescribed for the same being followed (*Mohd. Salimullah*, para 15). In its order, the Court, whilst considering whether Article 51 (c) of the Constitution of India could be invoked in case India is not a signatory to or has not ratified a treaty or convention, asserted that "there is no doubt that the National Courts can draw inspiration from International Conventions/Treaties, so long as they are not in conflict with the municipal law" (*Mohd. Salimullah*, para 12). However, concerning the situation in Myanmar, the Court stated that it could not "comment upon something happening in another country" (*Mohd. Salimullah*, para 12). Whilst accepting that the rights under Articles 14 and 21 were available to non-citizens, the Court held that right to not be deported fell under the ambit of the right to reside or settle in any part of the territory of India under Article 19 (1) (e) (*Mohd. Salimullah*, para 13). The Court went on to take note of "two serious allegations" made by the state in its reply, namely, that there was a threat to the internal security of the country and that agents and touts were engaged in the activity of providing safe passage into India to illegal immigrants owing to "the porous nature of the landed borders" (*Mohd. Salimullah*, para 14). The Court also noted that it had previously dismissed an application seeking similar relief in respect of Rohingyas detained in Assam (*Mohd. Salimullah*, para 14). Furthermore, the Court refused to allow the senior counsel representing the Special Rapporteur appointed by the United Nations Human Rights Council (UNHRC) to make submissions by simply

noting that “serious objections were raised to his intervention” (*Mohd. Salimullah*, para 3). Despite stating that municipal courts may draw inspiration from treaties provided they do not conflict with municipal law, the Court did not engage with the international instruments relied on by the petitioners to make a case for the existence of an international obligation towards non-refoulement, leaving this strand of the petitioners’ argument in abeyance (Bhatia 2021). Although adjudicating contentions about non-refoulement would necessarily require the Court to assess the state of affairs in the country of proposed deportation, it refused to “comment upon something happening in another country”, thereby rendering the very principle of non-refoulement nugatory (Nair 2021). By holding that the right to not be deported was subsumed within Article 19 (1) (e), which is available only to citizens, the Court did not take into account the interrelationship between Articles 14, 19, and 21 (Bhatia 2021), and its jurisprudence that “the expression ‘personal liberty’ in Article 21 covers a variety of rights, some of which ‘has been raised to the status of distinct fundamental rights’ and given additional protection under Article 19” (Justice K.S. Puttuswamy (Retd.) v. Union of India 2018, para 23).

Furthermore, the Court also failed to deal with the judgments of the Gujarat High Court in *Ktaer Abbas Habib Al Qutaifi v. Union of India* (1999) and the Delhi High Court in *Dongh Lian Kham v. Union of India* (2016), both of which had held the principle of non-refoulement to be inherent with the constitutional guarantee of life and personal liberty under Article 21. Concerning the allegations made by the Union of India, the Court brought the same within the operative part of the judgment without analyzing the same to any extent (Bhatia, 2021).

The Court’s order did not satisfactorily engage with the issue of international law as an aid to constitutional interpretation. The Court neither surveyed nor reiterated its pre-existing jurisprudence in this regard. It only addressed the use of treaties that India may not be a signatory to as sources from which the domestic courts may draw inspiration. The said analysis was not taken to its logical conclusion as the order is silent on whether the court can read the obligation of non-refoulement as codified in the Refugee Convention, 1951 and the Refugee Protocol, 1967 into the fundamental rights guaranteed under Articles 14 and 21. It abandoned its previous monist leanings by not engaging with the international obligations enshrined in the relevant provisions of the ICCPR, the CAT, and the ICPPED. Furthermore, the order did not examine the incorporation of norms of customary international law, and the issue of whether the principle of non-refoulement can reasonably be said to constitute a rule of customary international law; something that has been categorically contended by the petitioners (Brief for the petitioners, *Mohd. Salimullah* (2017)). As such, it may be said that the order suffers from an inadequate engagement with international law that constitutes a divergence from the Court’s trajectory in this regard.

CONCLUSION

The Constitution of India, despite being the longest written constitution in the world, provides limited guidance as to the complex relationship between international and municipal law. Formally, India is a dualist state that endorses transformation rather than an incorporation of the norms of international law. However, in a striking example of 'creeping monism', the judiciary has increasingly stressed the applicability of norms of international law, be they conventional or customary, provided they do not conflict with municipal law. Gautam (2019) had suggested that *Mohd. Salimullah* presented several doctrinal and methodological questions concerning the role of international law in domestic constitutional adjudication.

Unfortunately, the Court's interim order, in this case, falls short of these expectations as the Court does not fully engage with either India's obligations towards the principle of non-refoulement or its incorporation into the domestic legal framework. Instead, what is seen is a judgment that not only fails to address the petitioners' contentions but has the regrettable effect of negating the very principle of non-refoulement by sending the Rohingyas back to the state of persecution. 🌐

REFERENCES

1. "Myanmar Rohingya: What you need to know about the crisis." *BBC*, January 23, 2020. accessed 3 April 2021. <https://www.bbc.com/news/world-asia-41566561>
2. Bhatia, Gautam. 2021. "Complicity in genocide: The Supreme Court's interim order in the Rohingya deportation case" *Indian Constitution Law and Philosophy Blog*, April 8. accessed 15 April 2021. <https://indconlawphil.wordpress.com/2021/04/08/complicity-in-genocide-the-supreme-courts-interim-order-in-the-rohingya-deportation-case/>
3. Brief for the petitioners, Mohammad Salimullah v. Union of India, Writ Petition (Civil) No. 793 of 2017 (Diary No. 27338-2017). Accessed 15 April 2021. <https://images.assettype.com/barandbench/import/2017/09/Rohingya-Petition.pdf>
4. Chandra, Aparna. 2017. "India and international law: Formal Dualism, functional monism." *Indian Journal of International Law* 57 25-45. <https://doi.org/10.1007/s40901-017-0069-0>
5. Gautam, Khagesh. 2019. "The use of international law in constitutional interpretation in the supreme court of India." *Stanford Journal of International Law* 55 27-68. Accessed 13 April 2021. <https://law.stanford.edu/publications/the-use-of-international-law-in-constitutional-interpretation-in-the-supreme-court-of-india/>
6. Gibbens, Sarah. "Myanmar's Rohingya are in crisis: What you need to know." *National Geographic*, September 30, 2017. accessed 2 April 2021. <https://www.nationalgeographic.com/culture/article/rohingya-refugee-crisis-myanmar-burma-spd>
7. Goodwin-Gill, Guy, and McAdam, Jane. 2007. *The refugee in international law*. Oxford: Oxford University Press.
8. Government of India, Ministry of Home Affairs, "Letter to Chief Secretaries: Identification of illegal immigrants and monitoring thereof." August 8, 2017. accessed 17 April 2021. https://www.mha.gov.in/sites/default/files/advisoryonillegalmigrant_10092017.PDF
9. Hathaway, James. 2005. *The rights of refugees under international law*. Cambridge: Cambridge University Press.
10. Hegde, Venkatachala. 2013. "International law in the courts of India." *Asian Yearbook of International Law* 19 63-87 https://doi.org/10.1163/9789004379756_003
11. India. Constitution, Article 37.
12. Labman, Shauna. 2010. "Looking back, moving forward: The history and future of refugee protection" *Chicago-Kent Journal of International and Comparative Law*

10 1-21. Accessed 5 April

2021. <https://scholarship.kentlaw.iit.edu/ckjicl/vol10/iss1/2>

13. Lauterpacht, Elihu, and Benthlehen, Daniel. 2003. "The scope and content of the principle of Non-refoulement". In *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, edited by Erika Feller, Volker Türk, and Frances Nicholson, 87-177. UK: Cambridge University Press.
14. Nair, Ravi. 2021. "Supreme Court's Rohingya deportation order illegally flawed ignores principles of natural justice" *The Leaflet*, April 12. Accessed 20 April 2021. <https://www.theleaflet.in/supreme-courts-rohingya-deportation-order-illegally-flawed-ignores-principles-of-natural-justice/>
15. Parthasarathy, Suhrith. 2021. "Article 21 in a time of genocide: The Rohingya case before the supreme court of India" *Indian Constitution Law and Philosophy Blog*, March 28. Accessed 14 April 2021. <https://indconlawphil.wordpress.com/2021/03/28/article-21-in-a-time-of-genocide-the-rohingya-case-before-the-supreme-court-guest-post/>
16. Patnaik, Dabiru, and Siddiqui, Nizamuddin. 2018. "Problems of refugee protection in international law: An assessment through the Rohingya crisis in India" *Socio-Legal Review* 14 1-29. Accessed 3 April 2021. https://heinonline.org/HOL/Page?handle=hein.journals/soclerev14&div=5&g_sent=1&casa_token=&collection=journals
17. Press Trust of India. "SC to pronounce order on a plea seeking the release of Rohingyas detained in Jammu on Thursday." *Outlook*, April 7, 2021. Accessed 8 April 2021. <https://www.outlookindia.com/newsscroll/sc-to-pronounce-order-on-plea-seeking-release-of-rohingyas-detained-in-jammu-on-thursday/2060710>
18. Rajamani, Lavanya. 2016. "International law and the constitutional schema". In *The Oxford Handbook of the Indian Constitution*, edited by Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta, 143-159. New Delhi: Oxford University Press.
19. Ratnapala, Suri. 2013. *Jurisprudence*. Cambridge: Cambridge University Press.
20. Reuters. "India to deport all Rohingyas: Rijiju." *The Hindu*, April 15, 2017. Accessed 16 April 2021. <https://www.thehindu.com/news/cities/Delhi/india-to-deport-all-rohingyas-rijiju/article19493998.ece>
21. Shaw, Malcolm. 2017. *International Law*. New York: Cambridge University Press.
22. Von Bogdandy, Armin. 2008. "Pluralism, direct effect and the ultimate say: On the relationship between international and domestic constitutional law." *International Journal of Constitutional Law* 6 397-413. <https://doi.org/10.1093/icon/mon015>

Legal Cases

1. Bhavesh Jayanti Lakhani v. State of Maharashtra 2009 (9) SCC 551 (India).
2. Dongh Lian Kham v. Union of India (2016) 1 Civ LT 30 (India).
3. Gramophone Company of India Ltd. v. Birendra Bahadur Pandey (1984) 2 SCC 534 (India).
4. In Re: Berubari Union and Exchange of Enclaves AIR 1960 SC 845 (India).
5. Justice K.S. Puttaswamy (Retd.) v. Union of India (2018) 1 SCC 809 (India).
6. Ktaer Abbas Habib Al Qutafi v. Union of India 1999 CriLJ 919 (India).
7. Maganbhaishwarbhai Patel v. Union of India (1970) 3 SCC 400 (India).
8. Mohammad Salimullah v. Union of India- Interim Order 2021 SCC OnLine SC 296 (India).
9. Mohammad Salimullah v. Union of India WP (Civil) No. 793 of 2017 (India).
10. North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; the Federal Republic of Germany v. the Netherlands) I.C.J. Reports 1969.
11. Shatrughan Chauhan v. Union of India (2014) 3 SCC 1 (India).
12. State of West Bengal v. Kesoram Industries Ltd. AIR 2005 SC 1646 (India).
13. Vellore Citizens Welfare Forum v. Union of India (1996) 5 SCC 647 (India).
14. Vishaka v. State of Rajasthan (1997) 6 SCC 241 (India).



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THE ROLE OF THE JUDICIARY IN RECOGNIZING AND IMPLEMENTING INTERNATIONAL LAW: A COMPARATIVE ANALYSIS WITH SPECIAL REFERENCE TO SRI LANKA

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Abstract: *International law had had a profound impact and influence on the domestic legal system in the contemporary world. However, the status of international law within the domestic legal system is not properly defined in many of the jurisdictions including Sri Lanka. In the absence of such a constitutional provision, the judiciary as the last bastion of hope has a responsibility of interpreting domestic law in light of the international standards that have been agreed upon by the country through ratification of international treaties and those principles of customary international law that has become binding on the country. However, too much judicial activism could jeopardize the constitutional fundamentals of separation of powers and the rule of law. Therefore, this study argues that the best way to resolve this issue is by providing a constitutional provision for the role of the judiciary in the recognition and implementation of international law in a domestic context. Using a qualitative methodology with a comparative analysis of the constitutional provisions of the selected jurisdictions of India and South Africa a proposal is made for a constitutional provision for the judicial role in the recognition and implementation of international law in Sri Lanka. The results have revealed that a constitutional provision would help to advance the separation of powers and the rule of law and to well define the role of the judiciary in absorbing international treaty law to the domestic sphere, making the law more certain and predictable and upholding the rights and duties of individuals in a domestic context while fulfilling international obligations of a country under the domestic legal system.*

Keywords: *International Law; Judicial Activism; Constitutional Law*

INTRODUCTION

In many countries, the constitution would act as the supreme law of the country, where for example, the Preamble of the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka recognizes that its Constitution shall be the supreme law of the country. It would normally have a mechanism for the recognition and implementation of domestic laws. While these rules of domestic law implementation may be less problematic, the same cannot be said when it comes to implementation of international law in domestic contexts and this is a well-documented area of international law when it

comes to implementation of international treaties in particular (Hishashi 2015). Therefore, there is a need for enacting similar provisions in the constitution of a country for the recognition and implementation of international law within the domestic legal system to get rid of the uncertainty or any ambiguity that may arise in its absence. However, this recognition and implementation of international law should be done complying with separation of powers and the rule of law coming under the broad spectrum of Constitutionalism, while always taking into consideration the sovereignty of the country as well.

The separation of powers is an important tool for establishing an impartial and independent judiciary whose main function is to interpret and apply laws instead of creating substantive legal rules or norms concerning individual adjudication where the court is called upon to adjudicate on such a matter (Gerangelos 2009). On the other hand, rule of law, according to A. V. Dicey (Cosgrove 1981) is the supremacy of law above any other principle or precept. When it comes to the recognition and implementation of international law in a domestic context, upholding the notion of the rule of law is a vital consideration (Dyzenhaus 2005). One idea that comes under the broader notion of the rule of law is the idea of predictability and certainty of the law. It has often been found that, where there is an over-ambitious or overactive judiciary, the certainty of the law may be compromised as a matter of the judiciary's notion of justice and fairness (Molot 2000).

Therefore, this article looks at the different practices and attitudes of the judicial arm in the recognition and the implementation of international law in domestic contexts, whereby the practices, approaches, and the constitutional provisions of the selected jurisdictions of India and South Africa are analyzed for proposing an optimal constitutional model for allocating a proper role for the judiciary in recognition and implementation of international law in the domestic context of Sri Lanka.

JUDICIARY AND TREATY LAW

The executive is vested with the power of concluding treaties on behalf of the country. However, the executive is not allowed to directly bring international law without the participation or intervention of the legislature in many countries (Shelton 2011). This can also be justified under the notion of separation of powers since the law-making power is exclusively vested with the legislature. Against this backdrop, the respective role assigned to the judiciary is somewhat overlooked. This happens when the legislature fails to give effect to treaties that have been ratified by the executive by enacting enabling legislation to make such treaties a part of the domestic law. In such a situation the judiciary faces a dilemma in adhering to the broader notion of separation of powers and protecting the legitimate interest of the individuals who expect to yield the benefits from the treaties that have been ratified by the executive at the domestic

sphere, which concerns with the rights and duties of individuals. Therefore, it is argued that providing a proper constitutional guide as to the exact role of the judiciary concerning the recognition and implementation of international treaties at the domestic level would help the judiciary in not venturing into the law-making sphere which is left for the legislature under the separation of powers and to create certainty with uniformity of practice, thus enhancing the rule of law ideal of certainty of law.

JUDICIARY AND CUSTOMARY INTERNATIONAL LAW

The judiciary has a more significant and direct role to play in this regard. Once a litigant prays for a right or a duty that is derived from a principle of Customary International Law (CIL), the judiciary must decide on the existence and validity of such a CIL at the domestic level. In doing this, the judiciary is generally required to provide its interpretation as to the recognition and implementation of such rules of CIL in the domestic context. The judiciary being a forum for individuals to seek recourse against abuses of their rights and duties by the state, should have a systematic approach founded by a higher authority, such as the constitution to resolve such matters between the individuals and state, where the issue in question involves a principle of CIL (Haljan 2013). Therefore, to avoid any conflicts between the other state organs and the judiciary, it is argued that the constitution itself should provide for the role of the judiciary regarding recognition and implementation of CIL at the domestic level to uphold the constitutional fundamentals of separation of powers and the rule of law.

Constitutional Assignment of Judicial Powers and Functions Concerning International Law

The judicial branch is given the competency for interpreting and applying the laws that are recognized as being valid under the constitution. The same applies to the interpretation and application of international law in a domestic context when such are put into question. The Vienna Convention on Law of Treaties (VCLT) under Article 31 (1) provides that treaties are required to be interpreted in good faith by giving effect to its ordinary meaning, considering the context, having regard to the object and purpose of such a treaty. While the provisions are applicable at the international level, it is argued that its relevance at the domestic level is unclear since there is no established CIL on the issue. This fact emphasizes the lack of uniformity regarding the interpretation of international law at the domestic level since if there was a uniformity of state practice, the provision in the VCLT would have become binding upon the states as a matter of CIL. Therefore, it is argued that the judiciary should be provided with a proper guideline, preferably through constitutional provisions concerning the interpretation of both treaty and customary international law principles at the domestic level by spelling out the

competencies of the judiciary in this regard. To induct a common method for providing a proper role and guidance on interpretation to the judiciary in the process of recognizing and implementing international law in a domestic context, the relevant judicial practices and attitudes of Sri Lanka, India, and South Africa are comparatively discussed for this purpose.

SRI LANKA

When one considers the judicial attitude and practices regarding the application of international law in the domestic context, there seems to be no coherence that could be discerned from the attitudes and practices of the Sri Lankan Judiciary. This is especially true concerning the application of law related to human rights (Sornarajah 2016-2017). Article 4 (c) of the Constitution requires the judicial power of the people to be enforced through the courts established by Parliament. The judiciary is given the sole responsibility of adjudicating matters related to fundamental rights violations which result from executive and administrative actions under Article 126 (1) of the constitution. However, when it comes to the competencies of the judiciary regarding the recognition and implementation of international law at the domestic level, the Constitution has remained silent. This has created great confusion in predicting the use of international law principles by the Sri Lankan Courts. For example, in the case of (*Visal Bhashitha Kavirathne and Others v W.M.N.J. Pushpakumara*, Commissioner General of Examinations and Others 2012) the Court while referring to the fact that, right to education is even recognized in the Universal Declaration of Human Rights, ended its examination on the substance of the matter by only pointing out the existence of such a right without going another step by explaining as to why the Sri Lankan law should be reflective of such a recognized right. Since many of the judgments where the Courts do refer to an international legal instrument, it ends right there with a mere reference instead of going ahead with a critical evaluation of such standards against the existing law of the country.

The decided case law on this matter further exemplifies the non-uniformity of the judicial attitude and practices even concerning providing such lip service at least. In the case of (*Leelawathie v Minister of Defence and External Affairs* 1965), the question revolved around the refusal to grant registration of citizenship to a spouse. One of the questions for the court to decide was whether it amounted to a breach of the provisions of the Universal Declaration of Human Rights (UDHR). The court declared that even though the UDHR was of the 'highest legal order', it formed no part of the law of Ceylon (as it was back then) since the UDHR is not an applicable law in Sri Lanka. The disappointing aspect of the decision is that the court did not venture into an inquiry as to whether the UDHR has become a part of the law of Ceylon through the principles of CIL.

In the (in) famous case of (*Singarasa v Attorney General* 2013), the question that the court had to decide was whether an individual had recourse under the optional protocol to the ICCPR to make a claim for violation of his rights as guaranteed under the ICCPR which was ratified by Sri Lanka in 1980. The Court in its opinion declared that, since Article 3 vests the sovereignty with the people and Article 4 declares as to how such powers are to be exercised, it would be a violation of this sovereignty if an external body was allowed to adjudicate on this matter apart from the Sri Lankan judiciary. The court also went on to hold that, the constitutional dynamics of the country adhere with a dualistic approach where there is a need for enabling legislation to be enacted by the Parliament if a particular provision in an international agreement ratified by the executive is to take effect at the domestic sphere. While the Court was bold enough to state that Sri Lanka was a dualist country, it failed to properly explain why it is the case with a reason (Sornarajah 2016-2017).

The Court in its reasoning pointed out that the executive had no power to enact laws and anything done by the executive which violates the constitution is not valid. The Court explained that the accession to the optional protocol and the declaration made under Article 1 to the protocol thereof by the President back then, was inconsistent with Article 33 (h) of the constitution since it was not within the powers conferred upon the President by that Article. However, the court failed to make any reference to the provisions of the VCLT, where Article 46 provides that, as a general rule a state should not invoke the contention that its consent for a particular treaty was given in violation of its internal laws. The court did not make any effort to give a harmonized construction to make the law compatible with the country's obligations at the international level.

There have been some other instances in which the courts have taken a more purposive or some may call a teleological interpretation as to the recognition and implementation of international law in a Sri Lankan context. Often cited in this regard is the decision in (*Bulankulama v Secretary, Ministry of Industrial Development and Others* 2000) where the Court held that, by becoming a contracting party to the United Nations, Sri Lanka is not allowed to escape the obligations and responsibilities cast upon it by the said United Nations. The Court opined that the Stockholm Declaration of 1972 and the Rio Convention of 1992 is endorsed by the United Nations, though may not be as binding as an Act of Parliament and be termed as 'soft law' is binding upon the government if they are either expressly enacted or are adopted by the Supreme Court in its decisions.

Further, in the decision of (*Weerawansa v Attorney-General and Others* 2000) the Supreme Court used the provisions of the ICCPR in interpreting the Fundamental Rights guaranteed under the constitution of Sri Lanka. More recently, in the case of (*Manohari Pelaketiya v Secretary of Minister of Education* 2012), the Supreme Court used the provisions of the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) in interpreting the offense of sexual harassment at the workplace.

The Court reiterated the state's obligations derived from both the Constitution and international law regarding the protection of women. In (*Kariyawasam v Central Environmental Authority and Others* 2019) the Court endorsed the decision in (*Wijebanda v Conservator General of Forests* 2009) which recognized that the right to environment is implicit in any meaningful interpretation of Article 12 of the Constitution. The Court went on to state that, while some of the international instruments may not be binding on the government, the principles therein can be recognized by the judiciary in making their pronouncements.

The cases discussed above showcases a general uncertainty as to the attitudes and practices of the courts in recognizing and implementing international laws in the Sri Lankan context. While some decisions have utilized a monistic approach, some of the other decisions have applied a rigid dualistic approach. The zig-zag nature of these practices and attitudes does not help an individual who is trying to vindicate his rights, which may either arise from a ratified treaty or principles found under CIL. The matter is also exemplified by the fact even where the Courts have used international law in their interpretative endeavors, much of has remained mere lip service just to make good the judgment instead of bringing in substance for legal reasoning behind the arrival of a conclusion.

Therefore, it is argued that Sri Lanka should endeavor to instill constitutional provisions for assigning a clearly defined role for the judiciary for the recognition and implementation of international law at the domestic level.

INDIA

Indian Constitution has advocated for a dualistic approach when it comes to the recognition and implementation of treaty obligations and a monistic approach concerning the principles of CIL (Singh 2015). The judicial arm has always been praised for its activism in enhancing and protecting the rights of its citizenry and their role in recognition and implementation of international law at the domestic law has not provided any exceptions. In the case of (*L. Chandra Kumar v Union of India* 1997), the Court held that the judicial review process in India comprises of judicial review of the actions of the legislature, judicial review of the decisions of the judiciary itself, and administrative actions. Therefore, the role of the Indian judiciary regarding the recognition and implementation of international law must be studied in this background.

In the case of (*Vishaka v State of Rajasthan* 1997), the Indian Supreme Court held that, in the absence of effective measures to protect against sexual harassments under the domestic laws, recourse may be made to the International Agreements and their norms to give a purposive interpretation to Articles 14, 15 19(1)(g) and 21 of the constitution for providing safeguards against sexual harassment at the workplace.

The Court emphasized the need to interpret the fundamental rights as granted and protected under the constitution in light of the international standards where there is no conflict between such fundamental rights and international legal principles found upon such international laws and where harmony between the two is possible.

In (*Kesavananda Bharathi v State of Kerala* 1973) the Court observed that according to the provisions of Article 51 of the Constitution and to give effect to India's obligations under international law, the Courts are required to interpret the Constitution in light of the outlining principles of the United Nations Declaration on Human Rights. Sunil Agrawal (Agarwal 2010) comments that even where the Constitution or any other legislative enactment fails to provide for the proper role of the judiciary concerning the recognition and implementation of international law at the domestic level, through the use of judicial activism and its proactive attitude, it has been able to recognize and implement the international treaty and CIL obligations of the country to protect and advance the rights and liberties of individuals.

The main significance of the Indian judiciary in comparison to the approach taken by its Sri Lankan counterpart lies in the use of international law in its interpretative process. Unlike in Sri Lanka, the Indian judiciary has gone far beyond than providing mere lip service in the use of international law, where international law coupled with the rights recognized under the constitution has been advanced to include rights that were not originally or directly recognized under the constitution such as the right to a clean and healthy environment (Rosencranz 2002).

In a Sri Lankan context, what has been achieved by the judicial arm of India cannot be replicated since it would require a wholesome change in the judicial system where under the current constitutional setting, the Supreme Court is only allowed to scrutinize bills of Parliament, and the Parliament is precluded from reviving legislation under Article 80 (3) of the Constitution. Article 80 (3) of the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka provides that no court or tribunal shall call upon the validity of an Act of Parliament (even where it conflicts or otherwise repugnant with the provisions of the constitution). Therefore, putting in place a constitutional provision for the role of the judiciary concerning the recognition and

THE REPUBLIC OF SOUTH AFRICA

The 1996 Constitution provided constitutional provisions for recognition and implementation of both international agreements ratified by the Republic of South Africa and principles of CIL in the domestic sphere. It has not disappointed us with failing to mention the respective role of the judiciary in the recognition and implementation of international law in the domestic context either (Dugard 2005). Article 233 of the Constitution provides that; the courts must prefer an interpretation of legislation that is consistent with international law over any other interpretation which

may be inconsistent with international law. Article 39 of the Constitution which deals with the interpretation of the Bill of Rights as provided under Chapter 2 of the Constitution, states that the courts must consider international law when they interpret the substantive rights which are afforded to individuals. The use of the term 'must consider' is also of considerable importance since it obliges the judiciary to look into international law when they are interpreting the Bill of Rights since the same article gives a discretion for the courts in using foreign law as it uses the term 'may' instead of 'must' which makes it clearer that there is a positive obligation on the part of the judiciary in using international law to interpret the provisions of the Bill of Rights.

In the case of (*S v Makwanyane* 1995), the Court held that the term international law in this context involves both international treaty law and principles of CIL. In (*Carmichele v Minister of Safety and Security and Another* 2001) the Court looked at the decisions of ECtHR and CEDAW in arriving at its decision. This clearly shows the progressive nature of the court in expanding the rights granted to individuals under the Bill of Rights. The 1996 South African Constitution under Article 172 grants the judiciary the power to review legislation and its compatibility with the Constitution. Dugard (Dugard 2005) opines that sometimes this provision is invoked to challenge legislations for being incompatible with international law since international law is made a part of the Constitution. However, in the case of (*Azapo v President of the Republic of South Africa* 1996), the Court held that the inquiry is only limited to determining whether the statute in question is inconsistent with the constitution and it does not extend finding out whether it is inconsistent with international law.

The 1996 South African Constitution has once again led the way and shown the way to assign constitutional competencies regarding the role of the judiciary in recognition and implementation of international law at the domestic law. From a Sri Lanka perspective, the South African model does seem workable even under the current constitutional structure and therefore, it can be argued that this model is something that Sri Lankan lawmakers can easily adopt.

GUIDE ON INTERPRETATIVE PROCESS FOR THE JUDICIARY

The current Sri Lankan Constitution of 1978 does not provide any guideline for the interpretation of international law in the domestic sphere. The courts in the absence of any specific guidelines have used their measures and sense of justice and have given interpretations for the recognition and implementation of international law in the Sri Lankan context which has made it very difficult to create any certainty of the law which inevitably results in the breach of the constitutional fundamental of the rule of law which endeavors at making law certain in its application and interpretation to a given circumstance. Therefore, it is recommended that a constitutional provision be made for

guiding the judiciary on the use of international law concerning their duty of applying and interpreting law when they are required to do so.

Out of the two selected jurisdictions, only the South African Constitution of 1996 provides an interpretive guide for the interpretation and application of international law in a domestic context. The Indian experience has shown that through the premise of judicial activism, they have been able to apply and interpret domestic law in light of the principles and standards found under international law. Being the ultimate protector of the Constitution and the rights and liberties of its individuals, the Indian judiciary has also found a coherent way to interpret and apply international law in a domestic context and fulfill its obligation concerning the recognition and implementation of international law at the domestic context.

The need for such provision in the Sri Lankan context (Table 1) is also made necessary since, under the current constitutional framework, courts are not allowed to question the constitutional validity of statutes passed by the legislature and hence having a proper guide on the interpretation and application of international law at the domestic sphere is intensified.


Table: Proposed Constitutional Provision

Interpretation of International Law	Article x	(A)	The courts must interpret international law in a purposive manner to enable the state to fulfill its international obligations both at the international and domestic levels.
			Provided that where there is a possibility of interpreting a provision under several approaches, the courts must pick the approach which accords with the principles of international law.
		(B)	In interpreting domestic law considering international law, the courts:
		(i)	May presume that the legislature did not intend to legislate in a manner which would conflict or breach its international legal obligations;
			Provided where the Parliament has used unambiguous words as to their intention, the courts shall give effect to such notwithstanding any inconsistencies between domestic law and international law and domestic law.
Interpretation of Fundamental Rights	Article xx	(ii)	Must presume that the common law ¹ did not intend to make law inconsistent with the international obligations of the state.
			The courts must interpret the fundamental rights granted to individuals under the constitution using the standards and principles as found under international law and it may also have recourse to foreign law.

¹Refers to case law

CONCLUSION

It seems clear that allocating a proper role for the judiciary concerning the recognition and implementation of the international law in a domestic context would help to upkeep the constitutional fundamental of separation of powers, whereby demarking the role of the judiciary and spelling out what they can and cannot do, it will make sure that the judiciary will be stopped from usurping the legislative function in the disguise of judicial activism. Further to that, this kind of competence allocation coming from the Constitution will also help to keep the certainty of law which is a fundamental ideal coming under the broader notion of the rule of law.

The comparative analysis made with India and South Africa does suggest that resolving any conflicts which may arise as a result of not allocating the sphere of competencies to the judicial branch could hamper the constitutional fundamentals of separation of powers and the rule of law, while the certainty of law would also have to be compromised as a result. Therefore, the suggested constitutional provisions would become helpful for a country such as Sri Lanka, where the status quo of the current constitutional arrangements are not international law friendly. Therefore, it could be concluded that providing a constitutional provision that allocates the judiciary with its role when it comes to the recognition and implementation of international law at the domestic level can be seen as a viable solution in the realization of the rights and duties of individuals granted under the international law as the adjudication of such rights and duties would ultimately be reserved for the judiciary. 

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REFERENCES

1. Agarwal, S. (2010). Implementation of International Law in India: Role of Judiciary. *SSRN*, 1-14.
2. Azapo v President of the Republic of South Africa, 4 SA 671 (Supreme Court 1996).
3. Bulankulama v Secretary, Ministry of Industrial Development and Others, 3 Sri L R 243 (Supreme Court 2000).
4. Carmichele v Minister of Safety and Security and Another, ZACC 22 (Supreme Court 2001).
5. Cosgrove, R. A. (1981). *The Rule of Law: Albert Venn Dicey, Victorian Jurist*. Carolina: Carolina Press.
6. Dugard, J. (2005). *International Law: A South African Perspective*. Durban: Juta.
7. Dyzenhaus, D. (2005). The Rule of (Administrative) Law in International Law. *Law & Contemp Probs*, 127-166.
8. Gerangelos, P. (2009). *The Separation of Powers and Legislative Interference in Judicial Process*. Oxford: Hart.
9. Haljan, D. (2013). *Separating Powers: International Law Before National Courts*. Leuven: Springer.
10. Hishashi, O. (2015). Problems of Interaction Between the International and Domestic Legal Orders. *Asian Journal of International Law*, 246-278.
11. Kariyawasam v Central Environmental Authority and Others, SC FR Application No. 141/2015 (Supreme Court 2019).
12. Kesavananda Bharathi v State of Kerala, SCR 1 (Supreme Court 1973).
13. L. Chandra Kumar Vs Union of India, AIR SC 1125 (Supreme Court 1997).
14. Leelawathie v Minister of Defence and External Affairs, 68 NLR 487 (Supreme Court 1965).
15. Manohari Pelaketiya v Secretary of Minister of Education, SC/FR/No. 76/2012 (Supreme Court 2012).
16. Molot, J. T. (2000). The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role. *Stanford Law Review*, 1-110.
17. Rosencranz, A. (2002). *Environmental Law and Policy in India*. New Delhi: OUP.
18. S v Makwanyane, 3 SA 391 (Supreme Court 1995).
19. Shelton, D. (2011). *International Law and Domestic Legal Systems*. Oxford: OUP.
20. Singarasa v Attorney General, 1 Sri L R 245 (Supreme Court 2013).
21. Singh, G. (2015). *International Law*. Lucknow: EBC.
22. Sornarajah, M. (2016-2017). The Reception of International Law in Domestic Law of Sri Lanka in the Context of Global Experience. *Sri Lanka J Int'l L*, 3-42.

23. Visal Bhashitha Kavirathne and Others v W.M.N.J. Pushpakumara, Commissioner General of Examinations and Others, S.C. (FR) Application No.29/2012 (Supreme Court 2012).
24. Vishaka v State of Rajasthan, AIR SC 3011 (Supreme Court 1997).
25. Weerawansa v Attorney-General and Others, 1 Sri L R 387 (Supreme Court 2000).
26. Wijebanda v Conservator General of Forests, 1 Sri L R 337 (Supreme Court 2009).



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THE EUROPEAN UNION AND BREXIT: ANALYSIS FROM THE PERSPECTIVE OF THE VISEGRAD GROUP COUNTRIES

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Abstract: *The article aims to analyze Brexit from the perspective of the Visegrad Group countries in the context of the future of the European Union. Addressing this issue is important from the point of view of assessing the role of the EU for the Visegrad countries. The main thesis of the research is that Brexit will not lead to a reform of the EU in the coming years, which is what some of the Visegrad Group countries are trying to do. The article is provocative, because, during the migration crisis, the Visegrad Group was shown as a brake on the European integration process. After Brexit, it was considered that some of EU Member States could follow Great Britain and leave the EU. The article complements the scientific achievements in this field, as it presents the view from the country of Central and Eastern Europe.*

Keywords: *Brexit; V4; European Union; Visegrad Group; Covid-19*

INTRODUCTION

In the post-war history of integration processes in Europe, the outcome of the 2016 United Kingdom European Union membership referendum was an unprecedented event. Until 23 June 2016, the European Union was considered a stable, predictable, and, most importantly, attractive entity for both its Member States and countries aspiring to membership. The decision of the British people and the subsequent negotiation process has created great uncertainty in Europe, not so much in terms of whether the EU will survive or not, but to what extent Brexit will affect the security of the remaining Member States. This is because it should be assumed that the European Union is - according to the supporters of the theory of realism in international relations - an instrument in the hands of its Member States, serving them first and foremost, and only later integration itself. It should not, therefore, be assumed that the EU is the greatest good for all the Member States. It is, of course, the greatest good that Europe has given to Europe, but it is not an infallible and irreplaceable entity. Only five years after the UK's referendum, it is

also difficult to put forward any unequivocal theses as to whether - for the time being - the single event of the UK leaving the European Union will intensify the process of deepening disintegration, trigger a collapse, or perhaps - on the contrary - will be an impulse and a generator of changes that will ultimately prove to be a salvation for European integration.

The direction in which the European Union will be heading after Brexit is of particular importance for countries that have joined the organization relatively recently. Examples include Poland, the Czech Republic, Hungary, and Slovakia, known in political science as the Visegrad Group (V4). On the one hand, these countries have gained a lot from their membership in the European Union, while on the other hand, in the light of the ongoing disintegration processes, they may lose a lot, not to mention the case of the collapse of the European Union, which some scholars of contemporary international relations write about (Kearns 2018). Indeed, one should not be indifferent to theses about the potentially negative consequences of Brexit. For many years, both the European Union and its Member States did not take seriously the possibility of a country leaving the EU, even despite the appearance of Article 50 in the Lisbon Treaty, allowing such a step. As a consequence, on 23 June 2016, everyone from the European Union as an organization, through its Member States, to the United Kingdom itself, was taken by surprise. The effects of this surprise could be seen in the chaotic negotiations to regulate the British exit from the EU. The EU institutions and the Member States should therefore draw specific lessons from the British case and prepare for possible similar events.

This article aims to present the future of the European Union after Brexit from the perspective of the Visegrad Group. The thesis of the study is that no thorough reform of the EU should be expected in the coming years. This is due both to the weakness of EU institutions and passivity and uncertainty among the Member States as to further consequences of the Covid-19 pandemic. The Visegrad countries are no exception in this regard, although due to their specificities and the contesting attitude of some of them, they may want to shape the intergovernmental formula of cooperation more.

BREXIT: A PROBLEM FOR EUROPE AND THE VISEGRAD GROUP?

Despite the fact indicated in the introduction of this article and refer to the element of surprise related to Brexit, in fact for experts analyzing international relations this surprise should not be there. While trying to analyze the British beginnings in continental Europe, it is not difficult to notice drastic differences between the British and continental approaches to the implementation and evaluation of European integration. For the continental Member States of the then European Communities, European integration was a tool of consolidation and cooperation, with a slight hint of political Messianism and an opportunity to build a major political project in post-war Europe.

The British, on the other hand, from the very beginning of the discussion on European integration were 'next door'. Even well before joining the Communities on 1 January 1973, Winston Churchill spoke of Britain as the liaison between the United States and Europe. Later, already in conditions of membership, Prime Minister Margaret Thatcher was building an independent position of the British state, in great contrast to the perception of the integration process by the countries of continental Europe, which resulted, among other things, in the so-called UK rebate. Let us also note that the moment the Iron Lady took office raised British Euroscepticism to a much higher level. Indeed, since 1979 British membership of the European Communities, or more simply the so-called 'European question', has become one of the hottest topics in British domestic politics (Gowland *et. al*/ 2010). It was under her rule that the 'British logic of integration', based on the rejection of non-economic areas of cooperation and the construction of supranational political structures, was shaped and later strengthened - lasting until 1997 (the Labour Party won the elections and Tony Blair became Prime Minister). In turn, already in the terms of membership of the European Union, a sympathetic Prime Minister David Cameron claimed that he was in favor of integration, but on British principles. Fundamental to these principles was the British view of European integration as a process. While for continental states the key action was to deepen it, which by its very nature results in increasing interference by European institutions in national legal systems, for the British one of the priority actions was to block it. This was because, for London, European integration was purely a tool to achieve a specific goal, which, however, had its limitations. One of them was the social dimension, illustrated, *inter alia*, by the scale of acceptance of ordinary Britons for deepening integration within the European Union and the consequences not so much for the residents of London, Manchester, or Liverpool, but Corby, Coalville, or Belton. Thus, when analyzing the British dimension of EU membership, it is impossible not to get the impression that it focused mainly on those areas that brought London the greatest profits. This refers to the common market and the resulting profit and loss account for the British economy. The political relations were only an enclosure of a strongly instrumental treatment of the EU, with a lack of strong commitment to the idea of creating something more - and of a political nature than just a common market for the benefit of London.

The United Kingdom was the country that paved the way related to the practical application of Article 50. It should be noted that its content makes it the member state that initiates the process related to leaving the European Union, and not the other way round. Advocates of the theory of realism see international relations as a billiard field where the balls are states that move along the tracks of their national interests. In the context of Brexit, the UK was not only that ball but also became the rule maker in this integrationist game. The British have consumed the proverbial 'forbidden fruit' of Article

50 and broken the taboo that European integration is a one-way process. Thus, they paved the way for the other Member States to their possible exits.

For it must be remembered that the European Union of the 1990s and the European Union of 2021 are two completely different entities, and this is not about the aspect of international legal subjectivity, which was granted by the Treaty of Lisbon. The scratch on the glass of attractiveness, boundless trust, and treating it as the biblical 'Promised Land' is getting bigger and clearer. The European Union is increasingly perceived as an ineffective organization, acting in the interests only of the strongest Member States, interfering in matters dedicated exclusively to the Member States. This, in turn, means that despite the continuing benefits of the integration process, national egoisms are beginning to revive in some EU Member States. Let us note that countries such as Poland, Hungary, or Italy are not far from changing their attitude towards EU membership, or at least changing the official narrative at the political level. The UK has shown how to talk to the EU and how to do it on its terms, and ultimately how to leave it, without looking at EU institutions and Member States' capitals. It is, of course, difficult to assume that in the next few years Warsaw, Budapest, or Rome can replicate the British path to international independence, but they will be the focus of most observers of the European integration process.

A particular group of countries that may draw on the British experience in the future (not necessarily in the context of a desire to leave the EU, but in the way European politics is practiced) is the so-called new Member States, i.e. those that joined the EU in 2004, 2007 and 2013. The Visegrad countries occupy a special place in this group. These countries have a different perception of Brexit itself and its consequences than the UK and the so-called old Member States. The difference in the perception of the causes of Brexit by Western European countries and Central European countries, which include the 'Member States' of the Visegrad Group, is due to at least several factors. The first is the different post-war historical experiences. While the UK enjoyed the benefits of the Marshall Plan, countries such as Poland, Hungary and Czechoslovakia remained dependent on the Soviet Union, which precluded pro-development integration. The second determinant is the 'seniority' of EU membership.

While the UK until 2016 had experienced everything that the European integration process entails, the Visegrad countries are still learning the rules of the organization. The third determinant is the level of development of the UK versus the Visegrad countries. Until its membership, the UK economy was one of the largest in the European Union, while the Visegrad economies still had to (and still have to) catch up with the European leaders. This last conditionality boils down to an important reason why the Visegrad four decided to join the EU - a broadly understood security concept.

The UK, unlike the Visegrad countries, has for decades regarded itself as a self-sufficient state capable of acting independently in international relations in a way that enables it to exert concrete influence on other actors. From the perspective of political

realism, we can conclude that it is a strategically secure state, regardless of the circumstances in its environment. The V4 states, on the other hand, were looking for this security. Recalling the euphoria with which Poland entered the European Union on 1 May 2004, one could have the impression that this event put an end to all of Poland's problems and difficulties as a political actor in Europe. Society was convinced that joining this European family would provide it with the necessary political, economic, social, military, and other security and that the level of prosperity would significantly increase. Before 2004, for Poland and the other Visegrad countries, the European Union was Weber's ideal type of international cooperation that would bring development and security to these countries. To simplify the conclusion, one can say that while the V4 countries wanted to join the EU, the UK rather had to join the European Communities if it wanted to 'watch over' the development of continental Europe.

So why should Brexit be considered a problem for this part of Europe?

The exit of the United Kingdom from the European Union in the opinion of the Visegrad countries weakened and undermined the stability of the European security system at all levels: political, economic, social, and military. Hence, Brexit was not only incomprehensible for the Visegrad countries, but also came as a great surprise, generating changes in their foreign policy strategy. Poland was such a country in 2016. It will suffice at this point to quote a passage from the expose of Witold Waszczykowski, then Minister of Foreign Affairs, who at the beginning of 2016 said:

We will maintain dialogue and regular consultations at various levels with our most important European partners - first and foremost with the United Kingdom, with which we share not only an understanding of many important elements of the European agenda but also a similar approach to European security problems. The shared perception of European issues was confirmed during my recent visit to the UK (Information 2016).

As can be seen from this passage, the UK was to be the main cooperation partner in European politics for Poland governed by the right-wing bloc centered around Law and Justice. Importantly, this was not a temporary shift in foreign policy proposed by politicians originating from this party, but the idea and logic of the underlying European policy (Chojan 2016). Moreover, not only for Poland but also, for example, for the Czech Republic and Hungary at a certain point in their history of EU membership, the UK - as a proponent of the intergovernmental method of cooperation within the EU - was considered supportive of their aspirations to limit the deepening of the integration process. Hence, Brexit not only took away from them a state occasionally thinking like Warsaw, Prague, or Budapest but also strengthened the influence of Germany and France, states whose policies were often contested in all three capitals. The United Kingdom, as the largest country contesting the need to deepen the integration process, constituted a strong lobby for the Visegrad countries, but also a kind of balance against

an over-enthusiastic (or even unreflective) approach to the shape and future of the EU. Indeed, many Euro-enthusiasts underestimated the existence of a 'second, more contesting' group of the Member States and their opposition to the Euro-enthusiasts. Back in 2006, Stefan Meller, Minister of Foreign Affairs in the first government of Law and Justice in 2005-2006, wrote that "the euphoric Euro-enthusiasm, justified to some extent at the time when the issue of EU membership was being decided (...) if continued today, would certainly pose a threat. First of all, it would weaken the will and possibilities of effective participation in the international competition" (Meller 2006). In light of this statement and attempts to translate it into post-2016 events, Brexit represented a weakening of international competition in the form of a counterbalance to the influence of Berlin and Paris. In my opinion, the difficulties and weaknesses that the European Union has been struggling with basically since the fiasco of the Constitutional Treaty of 2004 are not only due to the fact of the admission of 13 new states at that time and the entry into force of the Lisbon Treaty, but also to the lack of the so-called critical Europeanism and the skillful balancing between the expectations and the possibilities for the influence of European institutions both in internal EU politics and in external relations. These issues were very often pointed out (e.g. in the context of the migration crisis) by both the Visegrad countries and the United Kingdom, considering them as a systemic problem in the integration process.

WEAKNESSES OF THE EUROPEAN UNION AND BREXIT FROM THE PERSPECTIVE OF THE VISEGRAD GROUP COUNTRIES

The period of EU membership of the Visegrad Group countries is a time of great turbulence in international relations. The financial crisis of 2007-2011, the migration crisis of 2015-2019 as well as the not fully tested solutions of the Lisbon Treaty has undermined the foundations of the European Union in internal and external politics. In fact, since the aforementioned Constitutional Treaty, discussions on disintegration are more frequent (Majone 2014; Cianciara 2015; Vollard 2014) than on the development of the European integration process. Many of the EU's current problems, which also led to Brexit, are attributed to the Lisbon Treaty, which was supposed to become a new opening for European integration but generated more problems than its creators could have expected. Already at the stage of agreeing its contents, discrepancies between the 'old' and 'new' EU Member States emerged, with Poland and the Czech Republic taking a particularly contesting stance. Writing about the Lisbon Treaty, Jacek Pawlicki stated that it "has further exposed all the sins of the EU (...) There is no miracle, Europe is neither stronger nor does it still speak with one voice, and institutions work as they did - not better at all" (Pawlicki 2010). The internal weakness of the European Union, which increases disintegration tendencies, boils down, *inter alia*, to transparency in decision-making by EU institutions. Among other things, this was discussed at the Bratislava

summit in September 2016 - the first informal meeting without the UK. In turn, with the British parliament rejecting Prime Minister May's plan for the second time, Slovak politicians said that the Brexit chaos is proof that the EU and its institutions should be reformed. In an attempt to save the UK's membership in the European Union, David Cameron pointed out three main weaknesses/challenges in the organization, which he believed should become its impulse for changes. To give the EU a chance to reflect and take initiative in 2013, he spoke about the problems of the Eurozone, which were the aftermath of the difficult times of the financial crisis. Another weakness/challenge he identified was the deteriorating international competitiveness of the European Union. He felt that the EU as an organization was stagnant and there was no progression in sight. However, he failed to appreciate that it was the internal frictions (also generated by the UK) between the EU Member States that were reflected in the international perception of the Union as a whole, the coherence of its foreign policy, and, above all, its effectiveness. This coherence should have been brought about by the aforementioned Treaty of Lisbon. However, this has not happened. Instead, the EU's great weakness is above all a lack of political will to strengthen it in the world. The Treaty of Lisbon has led to the creation of new organizational units responsible for external relations, thus deepening their bureaucracy, but this has had little effect on the effectiveness of the EU's international policy. For example, in the first years of the Lisbon Treaty, it was questioned whether, for example, the European External Action Service could represent a new opening in the political integration of the EU (Chojan 2012). By now we know that the breakthrough has not happened. The EU fails to implement the documents it has adopted, as exemplified by the so-called Lisbon Strategy, which was supposed to make the EU economy the most competitive in the world. Professor Józef M. Fiszer rightly wrote that:

The world not only loses itself in European 'summitology', but also does not believe in a Union that speaks with one voice, and the world's superpowers do business with the individual Member States of the European Union rather than with the Union as a whole, of which Russia is a vivid example. This leads to a polarization of the EU Member States and a feeling that their sovereignty is under threat (Fiszer 2014).

As a third weakness/challenge for the EU, David Cameron identified the gap between the organization and the citizens. The then British Prime Minister referred to the lack of democratic accountability and consent, which was felt in the UK. Many authors have written that the European Union has lost the spirit handed down by the Founding Fathers, based first on people and only later on the economy and the entire EU-administrative apparatus. According to some experts, only "building a European civil society will be a guarantee for further development of the European Union and a safe Europe free of conflicts and wars" (Fiszer 2011). Its construction can only be possible in a

situation of ensuring peace, security, and prosperity. A document that attempts to diagnose and outline these issues is the 2016 European Union Global Strategy (EUGS). This strategy is EU-centric, i.e. it focuses primarily on the interests of the European Union itself, its Member States, and, importantly, its citizens. Leaders of the Visegrad Group countries have repeatedly drawn attention to the need to listen to the voice of European citizens and to take action to improve their welfare and security. In a joint statement by leaders of June 2016, they stated: "We can never succeed unless we create a genuine Union of trust (...) Our citizens must see the Union stand firm on issues of common internal and external security interest" (Joint Statement of the Heads of Governments of the Visegrad Group Countries: Towards Union of Trust and Action 2016).

Nevertheless, there is no complete consensus among the Visegrad countries on the future shape of the European Union, as clearly resounded in 2016 during the Economic Forum in Krynica. While Jaroslaw Kaczynski and Viktor Orban openly spoke about the need for a moral counter-revolution in the EU during the 2016 Krynica Economic Forum, Bohuslav Sobotka and Robert Fico drew attention to completely different emphases, such as the increase in prosperity in the V4 countries achieved through EU membership.

All the issues raised by David Cameron can be considered components of the intra-EU crisis. The overcoming of the crisis is not helped by the policy of some Member States, who are aiming to nationalize their internal and foreign policies to a greater extent, taking the Visegrad Group countries as an example. Some of them (Poland and Hungary) openly contest the need to 'communitise' the EU's foreign and security policy. For it is difficult to imagine that Poland and Hungary - countries distrustful and reluctant towards the process of deepening European integration - will change their methods of achieving goals in foreign and security policy. The British approach to security policy and its implications for Central and Eastern Europe, also in the context of the Visegrad Group countries, is of particular importance here. The UK is well aware of the characteristics of the security environment, which includes, among others, the hybrid threat from the Russian Federation, international terrorism, threats to cybersecurity, or uncontrolled migration of people, which was one of the 'fuels' of the Brexit supporters' campaign. The attitude of the British people to the policies of the Russian Federation deserves special emphasis. The UK National Security Strategy of November 2015 states that Russia has become more aggressive, authoritarian, and nationalistic, increasingly defining itself in opposition to the West (National Security Strategy and Strategic Defence and Security Review 2015. A Secure and Prosperous United Kingdom, 2015).

British realism in the context of the security environment was primarily premised on limiting the Russian Federation's ability to influence the Central and Eastern European region. As one expert argues in the XX century, the British authorities realized the importance of Central and Eastern Europe for the security of Europe and the world. It was in their interest to have sovereign states in the region, which would be an

effective buffer separating Germany from Russia (Jureńczuk 2020). Thus, it would seem that the absence of the British in the EU would generate harm for the countries of Central and Eastern Europe, including the Visegrad Group. However, London clearly articulated that it is the North Atlantic Treaty Organization (NATO) and not the European Union that is for the British the mainstay of the so-called 'hard security', which in turn is in line with the policies of the Visegrad countries.

An important factor demonstrating British commitment to the North Atlantic Treaty Organization has been London's attitude to defense initiatives within the European Union. The UK had long thwarted EU efforts to develop its capabilities for fear of duplication with NATO. It saw initiatives to create a European army as detrimental to itself and international security in general. British distrust of EU defense initiatives was often based on a twofold nature, i.e. the belief that they threatened national sovereignty and were unlikely to work in any case. The same is true for some Visegrad states, such as Poland, the Czech Republic, and Slovakia, which see the essence of their security policy in the North Atlantic Treaty Organization. The desire to take security policy out of the hands of the EU has been apparent before, for example in the context of the US-Poland-Czech anti-missile shield, planned during the governments of G.W. Bush in the United States and Law and Justice in Poland.

SCENARIOS FOR THE DEVELOPMENT OF THE EUROPEAN UNION AFTER BREXIT FROM THE PERSPECTIVE OF THE VISEGRAD GROUP

Many experts and analysts are wondering what the development of the European Union after Brexit might look like. This is no different in Central Europe. All theories presented as something certain should be considered as political fiction rather than real politics. Nevertheless, it is worth attempting to determine potential scenarios for the development of the European Union, also from the perspective of the Visegrad countries.

Brexit as the Beginning of the End of the Lisbon European Union

It is an open secret that some of the Visegrad countries are not happy with the provisions of the Lisbon Treaty (although they agreed to it) because, on the one hand, they grant too much power to the EU institutions and, on the other hand, they restrict the freedom of the Member States.

The fundamental question that should therefore be put to the EU's political elite is what lessons have been learned from the Brexit referendum, the negotiations, and, ultimately, UK's final exit from the EU? Is the Lisbon EU not too far away from the Nice EU, which the V4 countries joined in 2004? While the post-Lisbon EU is heading in the direction of creeping federalism, Brexit, for example, for Hungary and Poland, may

become a fuel for expanding Euroscepticism and strengthening rhetoric based on sovereignty and, to put it bluntly, renationalizing their foreign policies, but not only theirs. These trends may also be reinforced by Italy's stance, and their outcome will be reflected in proposals for treaty reforms that strengthen the intergovernmental formula for cooperation. The seed of such tendencies was the Morawiecki-Orban-Salvini meeting in April 2021 in Budapest.

Brexit as Stagnation and Uncertainty

The second possible scenario is that of stagnation, that is to say, of no change in the logic of European policy and the EU institutions coming into conflict with some of the Member States, including the Visegrad countries, for example in the area of the rule of law, as is the case with Poland and Hungary. The Lisbon European Union is interfering very strongly in the internal policies of Member States.

The buckle that binds and protects the integration process from disintegration will be, on the one hand, the European Reconstruction Fund, established to combat the consequences of the Covid-19 pandemic, whose great beneficiaries will be the V4 countries led by Poland, and on the other hand, the possibility of enlarging the EU with new countries from the Western Balkans. The thesis that Brexit may lead to the stagnation of the integration process or even throw it into an undefined dimension is confirmed, for example, in the document presented by the European Commission in 2017. The White Paper on the future of the EU contained 5 scenarios for its development, covering loosening integration, a multi-speed EU, as well a federation.

European Commission officials have said they see its contents as 'the birth certificate of the EU of 27'. Meanwhile, as we look at the outcome of the post-Brexit changes so far, they are not even at the stage of planning a new family, let alone issuing birth certificates. What has happened in the EU is that, with the significant participation of the V4 countries, the concept of a multi-speed Europe has been strengthened, and its further development will not be beneficial in particular to countries such as Poland, the Czech Republic, and Hungary.

This scenario assumes the establishment of groups of states that could form 'coalitions of the willing' to cooperate more closely in certain areas, such as defense policy, internal security, taxation, or social affairs, and thus carry out a sectoral deepening of European integration. While deepening integration is not a major problem for the Slovaks, it is for the other three countries. It is hard to deny at this point that there will not be another 'exit' from the multi-speed EU.

Brexit as an Inspiration for Change

It seems that the V4 countries agree on the need to introduce systemic changes in the European Union. They differ, however, in their conceptualization and expectations, especially in the national dimension. Paradoxically, of all the V4 states, Slovakia is closest to the EU mainstream and furthest from the Visegrad contestation. Nevertheless, voices about the need for reform and change were also heard from Bratislava. Speaking about the changing scenario, one should go back to D. Cameron's statement in 2013. He drew attention to the fundamental problems of the European Union, but he considered them not from the point of view of the EU as an international organization, but from the perspective of a member state and the consequences related to further 'drifting' of the integration process. Reversing the process of European integration in this context referred to the need for its modification in terms of the expectations of the member state, while Article 50 TEU was the legal instrument for its practical implementation. It, therefore, seems that while Brexit will inspire changes in the way the EU functions, it will be forced from the perspective of the strength of Article 50 TEU, rather than a rational desire for changes in European institutions. The Union, wishing to at least maintain its position - under this scenario - cannot allow another 'exit'. It is an open question and an issue for another academic study to change the treaty norms in a way that would allow the EU institutions to exclude Member States - e.g. following the example of Article 6 of the UN Charter. From the perspective of 2021, however, this seems to be a political dream rather than a political reality. Nevertheless, in 1993 when the Maastricht Treaty came into force, no one thought about Article 50, which has been in force since 2009.

CONCLUSION

It is extremely difficult to write about the European Union after Brexit just one year after its formal entry into force. However, it is worth discussing and reflecting on possible scenarios. And the fact of having an unruly member state does not always have to mean that the integration process is hampered. Just as having the Visegrad countries with experience of the Soviet occupation and difficult history in its ranks allows the European Union to look at European issues with more distance and sensitivity, it is also important to have such 'politically difficult' countries as the United Kingdom in its structure. David Cameron, to win the elections in the UK, started to play a very dangerous game driven by the wave of Euroscepticism and anti-EU sentiments among the British people, which ultimately outgrew him and ended up in the biggest institutional crisis in the post-war history of European integration.

Looking at the pace at which EU leaders are attempting to change the EU and considering the international and economic conditions caused by the Covid-19 pandemic, it is difficult to expect thorough and drastic reforms. It seems, therefore, that

the scenario of stagnation of the European project is the most realistic and, paradoxically, the safest for the difficult post-Covid times. And even the Visegrad countries, so skeptical for some and realistic for others, are not able to present an alternative or even a proposal to modify the European project. Over the last 5 years, none of the four Visegrad capitals has presented its vision of the development of European integration. Pointing out changes and blaming Germany and France is unfortunately not enough. 🌐

REFERENCES

1. Chojan, Adrian. 2016. „Fundamenty ideowe i cele polityki zagranicznej Prawa i Sprawiedliwości z perspektywy 2005 roku”, *Myśl Ekonomiczna i Polityczna*, nr 1.
2. Cianciara, Agnieszka. 2015, „W poszukiwaniu alternatywnych modeli integracji : Europa jako klub klubów”, *Myśl Ekonomiczna i Polityczna*.
3. Fiszer, Józef. 2011. „Skutki członkostwa w Unii Europejskiej dla suwerenności i tożsamości kulturowej Polski”, *Myśl Ekonomiczna i Polityczna*. nr 2.
4. Fiszer, Józef. 2014. „Co z suwerennością Polski po dziesięciulatach członkostwa w Unii Europejskiej?”. *Myśl Ekonomiczna i polityczna*.
5. Gowland, David, Turner Artur, Wright, Alex. 2010. „Britain and European Integration Since 1945. On the sidelines”, London.
6. *Joint Statement of the Heads of Governments of the Visegrad Group Countries: Towards Union of Trust and Action*, 28.06.2016.
7. Jureńczyk, Łukasz. 2020. „The United Kingdom Towards the Military Security of Poland and the Baltic States in the 20th and 21st Centuries”, *Rocznik Bezpieczeństwa Międzynarodowego*.
8. Kearns, Ian, 2018. „Collapse: Europe After The European Union”, Biteback Publishing, London.
9. Majone, Giandomenico. 2014. „Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?”, Cambridge University Press, Cambridge.
10. Meller, Stefan. 2006, „Język polityki i racja stanu”, *Rzeczpospolita*.
11. *National Security Strategy and Strategic Defence and Security Review 2015 A Secure and Prosperous United Kingdom*, London 2015.
12. Pawlicki, Jacek. 2010. „Europa wciąż jest słaba”. *Gazeta Wyborcza*.
13. Pełna treść expose Witolda Waszczykowskiego. 2016. accessed 13 December 2020 , <https://www.rp.pl/Rzad-PiS/160129236-Pelna-tresc-expose-Witolda-Waszczykowskiego.html>
14. Vollaard, Hans. 2018. „Explaining European Disintegration”, *Journal of Common Market Studies*.



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EXECUTION OF IMPRISONMENT SENTENCED BY JUDGMENT OF THE INTERNATIONAL CRIMINAL COURT

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Abstract: *One of the current issues of criminal law, in general, is the issue of execution of a criminal judgment sentenced by the international criminal court (ad hoc or permanent international criminal court). The issue is ongoing because international criminal courts do not have their institutions for the enforcement of criminal sanctions they impose, but are, in that regard, instructed to cooperate with states that express readiness to execute criminal sanctions - imprisonment sentences imposed by an international criminal court in their prison facilities. Among the numerous issues related to this issue, the paper analyzes only those related to the legal basis for standardization, conditions, and manner of execution of a prison sentence imposed by an international criminal court.*

Keywords: *International Criminal Court; Ad Hoc Tribunal for The Former Yugoslavia; Imprisonment Sentence; Life Imprisonment; Prison Facility; Supervision of the Execution of a Sentence*

INTRODUCTION

The execution of imprisonment sentenced by the judgment of the International Criminal Court in our region gained its relevance with the establishment of the *ad hoc* Tribunal for the former Yugoslavia in 1993¹, and then with the establishment of a permanent International Criminal Court by adopting its statute in Rome on July 17, 1998 (Law on Ratification of the Rome Statute, Official Gazette of the FRY - International Agreements, No. 5/2001). Of course, it cannot be concluded from this that these are the only sanctions that can be imposed by an International Criminal Court. On the contrary, there is also a fine and confiscation of income, property, and goods, but those as

¹ The Court was established on May 25, 1993, by UN Security Council Resolution 827.

additional criminal sanctions are not the subject matter in this paper. The key basis for the topicality of this issue lies in the fact that these two, as well as other international judicial institutions of this character,² do not have facilities for the execution of imprisonment they impose, which is why they rely on the national legislation of those states that have accepted execution of judgments of the International Criminal Court on their territory (Škulić and Bajović 2018). As a result of this, what arises first is the question of (in)compatibility of this issue with the issue of execution of a criminal judgment of another state court as one of the newer forms of international criminal cooperation in criminal matters between states in general (Bejatović 2017, 197).

The differences are multiple and are reflected primarily in the reasons for their standardization. The main reason for predicting the possibility of executing a criminal judgment of another state in the state of which the person is a citizen is the fact that the convicted person is equal concerning the domestic perpetrator of the same act only in a criminal legal and criminal procedural sense, but not in penitentiary terms. In contrast, the key reason for the special standardization of the issue of execution of a criminal judgment of the International Criminal Court lies in the fact that these international judicial institutions do not have their facilities for the execution of a sentence, regardless of whether it is a certain duration or life imprisonment. However, from this key difference in the reasons for standardizing the execution of a criminal judgment on the territory of a state that was not pronounced by its judicial bodies, it must not be concluded that there are no compatibilities between the execution of a criminal judgment of another state court and the execution of the judgment of an International Criminal Court. On the contrary, there are many compatibilities. One of them is contained in the fact that in both cases it is not only about the interest of international crime suppression, but also about the interest of the efficiency of the fight against crime in general. In this sense, Jescheck, quite rightly, points out that this form of legal aid represents a new means of power for states to pursue international criminal policy in cooperation with each other while creating the best chance for resocialization of a convicted person (Jescheck 1986, 35). Secondly, when we talk about the choice of the state in which the criminal judgment of the International Criminal Court will be executed, one must also keep in mind is one of the key reasons for allowing the execution of a criminal judgment of another state, and that is the rehabilitation of a convicted person and respect for international standards on the protection of basic freedoms and rights and generally accepted international legal standards of persons serving a criminal sanction imposed on him (Stojanović 2018). In a word, in the case of execution of a criminal judgment of another state and execution of a judgment of an International Criminal Court, generally accepted international legal standards on this issue must be respected, and these are numerous.

² We talk about all *ad hoc* international criminal courts.

Finally, when it comes to general remarks, it should be noted that despite the compatibility of many decisions for the execution of a criminal judgment of the International Criminal Court in general, regardless of whether it is an *ad hoc* Tribunal for the former Yugoslavia or a permanent International Criminal Court, there are numerous differences between them and they require the need for a separate analysis of this issue depending on which court it is (permanent International Criminal Court or *ad hoc* court) (Caianiello 2013). Furthermore, when it comes to *ad hoc* courts, the subject of analysis is the execution of the judgment of the *ad hoc* Tribunal for the former Yugoslavia. Arguments for the justification of such an approach to this issue in *ad hoc* courts do not need to be specifically proven.

EXECUTION OF IMPRISONMENT SENTENCED BY *AD HOC* TRIBUNAL JUDGEMENT FOR THE FORMER YUGOSLAVIA

In the last three decades, after the establishment of the *ad hoc* Tribunal for the former Yugoslavia (hereinafter: the Tribunal) in 1993, above all, the issue of the execution of the criminal judgment of this international judicial institution, i.e. the imprisonment sentence imposed by this court, is current. The relevance of the issue lies in the fact that this, as is the case with other international judicial institutions of this character, does not have its capacity to execute the prison sentences it imposes (Kaseze 2004). For this reason, the court relies in this regard on the national legislation of those states that accept the execution of Tribunal judgments on their territory (Škulić 2013, 80). Observed from the aspect of the Statute of this international judicial institution, the execution of its criminal judgment is discussed in Article 27 where it is envisaged that imprisonment (for a specified period or life) shall be carried out in a state-designated by the International Tribunal from the list of states which have expressed their readiness to accept the sentenced person to the UN Security Council.³ Execution shall be carried out under the positive law of that State, under the control of the Tribunal or a body designated by the Tribunal (Jorgensen 2000). In addition to this, which seems completely indisputable, the fact that deserves attention is the fact that even before the adoption of the Statute of the Tribunal, the place of execution and the manner of execution was announced by the Secretary-General of the United Nations (hereinafter: UN) in his report of 3 May 1993 in which he pointed out that the nature of the crime and the character of the Tribunal indicates that the execution of the judgment should take place outside the territory of the former Yugoslavia and that states should be encouraged to express their readiness to offer their prisons for execution (Kokolj 1995, 187). In connection with this position, it is interesting to point out the fact that much

³ Statute of the *ad hoc* Tribunal for the former Yugoslavia, https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_bcs.pdf [Accessed: 10 March 2021]

earlier before the establishment of the Tribunal, the UN recommended that states conclude bilateral and multilateral agreements on the execution of foreign court judgments in the country of which the convicted person is a citizen. The reasons for this quite correct position of the UN are primarily contained in the fact that the perpetrator of a crime convicted in another state and thus by an International Criminal Court concerning a domestic perpetrator of the same act is equal only in a criminal legal and criminal procedural sense, but not and in penitentiary terms. This is primarily due to lack of knowledge or insufficient knowledge of the language, lack of knowledge of legal regulations, difficulty in communication and visits of relatives due to distance and other administrative obstacles, aggravated contact with defense counsel and the like (Horvat 1987, 96). In addition, in the theory of criminal law, there is a unique understanding that in determining the meaning of this institute, one should start not only from the interest of international crime suppression but also from the setting of a contemporary theory about the goal of criminal sanctions. From the aspect of today's, completely correct understandings about the goal of executing criminal sanctions, its goal is the resocialization of the convicted person and thus his reintegration into society after serving the sentence, which is realized faster and easier in the environment to which he belongs - in his country. However, despite all this, a few decades later, the UN Secretary-General denies what the UN itself had previously advocated that the execution of the sentence imposed by this Court be carried out outside the territory of the former Yugoslavia. With such a solution, the position of the convicted person after his conviction by this Tribunal for the committed criminal offense worsens, and even among the convicts themselves, there can be, there has been and there is discrimination in the penitentiary phase. For example, when two convicts for the same crime were sentenced by this court to the same sentences, and one was sent to Sweden and the other to Iran, due to different penitentiary systems, their position is drastically different. Furthermore, although so many years have passed since the establishment of the Tribunal (Beigbeder 2006, 304), and even though it has already ceased to function, a relatively small number of states have expressed readiness to be on the list of states to serve their sentences and some states even set additional conditions for execution, such as e.g. to accept only their citizens for execution or persons who have a permanent residence with them, etc. However, despite the expressed readiness of the states of the former Yugoslavia for convicts to serve the criminal sanctions imposed by this court in their prisons, such cases have not been recorded. All this in itself, to say the least, speaks of the character of this court.

Observed from the aspect of the Republic of Serbia, what deserves attention is the fact that based on Article 34 paragraph 1 of the Law on Cooperation with the International Criminal Court (Official Gazette of the FRY, No. 18/2002 and Official Gazette of Serbia and Montenegro, No. 16/2003, hereinafter: the Law), it accepted the possibility of executing the final judgment of this Court in its competent institutions.

However, despite all this, that readiness was unfortunately not accepted. In addition to the general reasons for the inadequacy of this approach of the Tribunal to this issue, the following two features of special importance for the status of a convicted person by this court should be pointed out which would possibly occur when serving the sentences imposed by that court in prisons in the Republic of Serbia. These are: first, imprisonment would be carried out according to the regulations of the Republic of Serbia, but with the supervisory function of the Tribunal (Article 34, paragraph 3 of the Law) (Skulić 2005, 107); secondly, starting from the fact that possible changes in the final judgment of this court can be made only based on its decision and not the decision of the judicial bodies of Serbia, Article 35 of this Law stipulates that in case the conditions for a pardon, mitigation of sentence or conditional release are met according to the regulations of the national legislation of the Republic of Serbia, the International Criminal Court is notified to make an appropriate decision (Radulović 2009, 211), which means that judicial institutions of the Republic of Serbia would not be able to in any way correct the criminal sanction imposed by the Tribunal.

EXECUTION OF PRISON SENTENCED BY THE JUDGEMENT OF THE PERMANENT INTERNATIONAL CRIMINAL COURT

The issue of the execution of the criminal judgment of the permanent International Criminal Court is an issue that will become increasingly important. The reasons for the correctness of such a statement are indisputable and do not need to be analyzed separately. Viewed from the aspect of the sources of law that regulate the issue of execution of the criminal judgment of this court, they are twofold. In addition to the Rome Statute⁴ (Articles 103-111), there are also Rules of evidence and procedure before this court.⁵ Observed about the manner of regulating this issue in the *ad hoc* Tribunal for the former Yugoslavia and this court, there are two key differences. First, the permanent International Criminal Court pays far more attention to the issues of execution of its judgment. Secondly, it does not contain the downsides that are present on this issue at the *ad hoc* Tribunal for the former Yugoslavia (there is no exclusion of the possibility of execution of the pronounced judgment in prison facilities of the state of which the convicted person is a citizen before this court). In a word, in standardizing this issue, far more attention was paid to universal-generally accepted standards of execution of a criminal judgment of a foreign court as a special and increasingly relevant form of international criminal cooperation in general.

⁴ Rome Statute of the International Criminal Court, <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> [Accessed: 18 March 2021]

⁵ Rules of evidence and procedure, <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf> [Accessed: 18 March 2021]

Among the many features that characterize the execution of the criminal judgment of the permanent International Criminal Court (hereinafter: the Court), the following are of special importance:

First, this court does not have the capacity - facilities for the execution of imprisonment. The execution of the criminal sanction imposed by this court is also realized in cooperation with the member states of the Statute. The legal basis for cooperation between the court and the state on this issue is formal and is reflected in the cumulative fulfillment of three conditions. These are: that a specific state has previously manifested its readiness for the sentence to be carried out on its territory, and the court can but does not have to accept its readiness. Next, that the Court had placed such a state on the list of states in which the sentence of imprisonment could be enforced, and finally that the Court had decided that the sentence of imprisonment was being enforced in that state itself (Article 103, paragraph 1 (a) of the Statute).

Secondly, the possibility that a person convicted by this court is serving a sentence in the prison facility of his country is not excluded here, as well as the possibility of serving a prison sentence in a host state prison if no other state is specified (Article 103, paragraph 4 of the Rome Statute).

Third, the key circumstances that the court takes into account when choosing the state in which a convicted person will serve a prison sentence from the list of reported states are: the principle that member states should share responsibility for the application of imprisonment following the principle of the equitable division including the principle of geographical distribution, but that these circumstances are not of a limiting nature since the elements of the principle of the equitable division include all other relevant circumstances, which is *quaestio facti* depending on the factual features of the particular case; the degree of implementation of generally accepted international legal standards on the treatment of prisoners in the legislation of a particular country; citizenship, nationality, and attitude of the convicted person which is not binding but must be taken into account;

Fourth, the Presidency of the Court shall inform the competent authorities of that state of the final decision on the choice of the state in whose territory the sentence will be served and at the same time provide them with the documentation necessary for the execution of the sentence, but the transfer of the convict to the state of enforcement will not take place before the final decision on the sentence, and the state which has accepted the execution of the sentence imposed by the Court on its territory may always revoke its decision on acceptance. Also, the court has the right to decide at any time to transfer a convicted person to a prison facility of another state, whereas the transfer can be requested by the convicted person as well, at any time during the execution of the sentence, but a change of state of execution of the sentence is possible only based on a decision of the competent body of the court (Josipović, Krapac and Novoselec 2001, 270).

Fifth, the sentence is executed according to the rules of the state in whose institution the sentence is executed, provided that they must be based on two assumptions. They must comply with generally accepted standards of treatment for prisoners and must not, in any case, be more favorable or unfavorable than those under which persons convicted of similar offenses in the state of enforcement are served. Supervision over the execution of the sentence is performed by the court, and to that end, the communication between the convicted person and the Court during the entire time of execution of the sentence must be unimpeded and confidential (Article 106, paragraph 3 of the Rome Statute);

Sixth, the state of enforcement cannot change that sentence. It may not release the convicted person until the sentence imposed by the court has expired. The sentence of imprisonment is binding on all member states of the Rome Statute and can in no case be changed by a decision of judicial or other authorities of the state of enforcement. The right to amend a final judgment belongs only to the competent bodies of the permanent International Criminal Court, and this can only happen under the acts of the Court. Thus, for example, mitigation of the sentence - its reduction can occur only after the convicted person has served 2/3 of the sentence or 25 years in the case of life imprisonment, in which case there is a mandatory consideration of this issue by the Court (Article 110, paragraph 3 of the Rome Statute). This happens even in the case when the imposed sentence of life imprisonment is executed in the prison facilities of the states that do not allow the possibility of release on parole of persons sentenced to life imprisonment, which is, for example, the case with the Criminal Code (Official Gazette of RS, No. 85/2005, 88/2005 - amended, 107/2005 - amended, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94 / 2016 and 35/2019) of the Republic of Serbia (Ignjatović 2019, 79).

Seventh, a convicted person in the custody of the state of enforcement shall not be subject to prosecution, punishment, or extradition to a third state for any act of that person which occurred before the extradition of that person to the state of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the state, provided that the Court makes its decision on this issue only after hearing the convicted person (Article 108, paragraph 1 of the Rome Statute);

Eighth, if a convicted person escapes from a prison facility and flees from the state of enforcement, that state may, after consulting the Court, request the surrender of the person from the State in which that person is, under applicable bilateral agreements, or it may also request that the Court itself request the surrender of the convicted person. In addition, there is the right of the Court to rule in such a case that an escaped convicted person be extradited not only to the State in which the sentence is being served but also to another State (Article 111 of the Rome Statute). Contrary to this situation, in the case of an escaped convict from a prison facility and his hiding in the

territory of the state in which the institution is located, the problem is resolved following the laws and other acts of that state;

Ninth, the convicted person may remain in the territory of the state of enforcement after serving the sentence imposed on him, and if he is not a citizen of that state, provided that the competent authorities of that state allow it. In addition, this person may, following the law of the state of enforcement, be transferred, taking into account his position on the matter, to any state which must receive him as well as to another state whose competent authorities so agree (Article 107 paragraph 1 of the Rome Statute).

CONCLUSION

One of the current issues when it comes to the International Criminal Court, in general, is the issue of the execution of prison sentences that they impose. The relevance of the issue lies in the fact that these international judicial institutions do not have the facilities for the execution of the criminal sanctions they impose.

There are three key results of the analysis of the provisions of the legal acts of the *ad hoc* Tribunal for the former Yugoslavia and the Permanent International Criminal Court, which deal with the issue of the execution of the prison sentences they have imposed.

First, the execution of prison sentences imposed by the *ad hoc* Tribunal for the former Yugoslavia is not in line with the key criminal and political reasons for legalizing the execution of a foreign court's verdict, which is to allow the convict to serve his sentence in a prison facility of his country.

Secondly, the standardization of the issue of execution of the verdict of the permanent International Criminal Court is under generally accepted international legal standards which treat both the issue of execution of the criminal judgment of a foreign court and the issue of the status of a convict during the execution of a prison sentence.

Thirdly, even though the prison sentences imposed by the judgment of the permanent International Criminal Court are served in the prison facilities of some of the states, the permanent International Criminal Court is not only unavoidable but can also be said to be a key subject of its execution. It decides on the choice of the state in which the convicted person will serve the sentence imposed on him and supervises its execution. Then, the final judgment can, during the execution, be changed only by the decision of the competent body of the permanent International Criminal Court and not by the decisions of the judicial bodies of the state in which the pronounced prison sentence is executed.

REFERENCES

1. Bejatović, Stanko. 2017. Fundamentals of International Criminal Law. Faculty of Law. Kragujevac.
2. Beigbeder, Yves. 2006. Judging war Crimes and Torture. MartinusNijhoff Publishers. Boston
3. Caianiello, Michele. 2013. "Models of Judicial Cooperation with *Ad Hoc* Tribunals and with a Permanent International Criminal Court in Europe" In *Transnational Inquiries and Protection of Fundamental Rights in Criminal Proceedings*, edited by Stefano Ruggeri, 111- 125. London: Springer
4. Criminal Code of the Republic of Serbia, "Official Gazette of the RS", No. 85/2005, 88/2005 - cor, 107/2005 - cor, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019
5. Horvat, Vlasta. 1987. "Execution of a foreign criminal verdict" *Yugoslav Review of Criminology and Criminal Law* 1: 91-105.
6. Ignjatović, Đorđe. 2005. "Sentence of life imprisonment - reasons for introduction and review of solutions in the last amendment to the Criminal Code" In *Reform of criminal legislation of Serbia*, edited by Stanko Bejatović, 71- 85. Belgrade: Serbian Association for Criminal Law and Practice
7. Jeschek, Hans Heinrich. 1986. *Strafrecht im Dienste der Gemeinschaft, Angewandte Beiträge zur Strafrechtsreform zur Strafrechtsvergleichung und zum Internationalen Strafrecht aus den Jahren 1953-1979*. Duncker&Humbolt. Berlin
8. Jorgensen, Nina. 2000. Responsibility of states for international crimes. Oxford: Oxford University Press
9. Josipović, Ivo, Krapac, Davor, and Novoselec, Petar. 2001. Permanent International Criminal Court. Official Gazette. Zagreb
10. Kaseze, Antonio. 2004. International Criminal Law. Belgrade Center for Human Rights. Belgrade
11. Kokolj, Mitar. 1995. International Criminal Tribunal for the Former Yugoslavia. Faculty of Law. Belgrade
12. Law on Cooperation with the International Criminal Court, Official Gazette of the FRY, No. 18/02 and Official Gazette of Serbia and Montenegro, No. 16/2003.
13. Law on Ratification of the Rome Statute, Official Gazette of the FRY - International Agreements, No. 5/2001
14. Radulović, Drago. 2009. International Criminal Court. Faculty of Law. Podgorica
15. Rules of evidence and procedure. Available at: <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>
16. Rome Statute of the International Criminal Court. Available at: <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

17. Statute of the *ad hoc* Tribunal for the former Yugoslavia. Available at:
https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_bcs.pdf
18. Stojanović, Zoran. 2018. International criminal law. Lawbook. Belgrade
19. Škulić, Milan. 2005. International Criminal Court. Faculty of Law. Belgrade
20. Škulić, Milan. 2013. "One view of the Hague tribunal and its place in history." In *The Hague Tribunal between Law and Politics*, edited by Jovan Ciric, 56-120. Belgrade: Institute for Comparative Law
21. Škulić, Milan and Bajović, Vanja. 2018. Historical development of international criminal justice and basic features of the procedure before the International Criminal Court. Faculty of Law, University of Belgrade. Belgrade



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THE IMPORTANCE OF FINANCIAL EDUCATION FOR THE BANK CLIENTS' PROTECTION IN KOSOVO

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Abstract: *Technological developments are not easily understood even by people who have advanced education and this leaves much to be expected for other groups. Financial services and banking products are also 'complicated' for professionals, not to mention the ordinary client. As a result of the features of financial products and services, especially banking, information is required as an initial form of knowledge of these services and products, and this information is intensified through a constant process such as education. Hence, this article argues how financial education is performed in Southeast Europe and even in the EU. This article also elaborates on the financial education in Kosovo concerning the protection of banking clients' rights, taking into account the financial education practices from which the Kosovo system can benefit.*

Keywords: *Financial Education; Protection of Banking Clients' Rights; Kosovo; Best Financial Education Practices*

INTRODUCTION

Information about the product or service we receive is the first step in establishing a healthy relationship between the customer and the business. Dissatisfaction can arise from poor customer information and thus we do not have a healthy relationship. In the time of information alone is not enough for some products and services but a longer process is needed, which will be in function of complete and continuous information, and this is the process of education. When we talk about banking products and services, we all agree that they have recently developed quite a lot. But how much are the customers informed about these developments of banking products and services? How does the region of Southeast Europe stand when it comes

to financial knowledge, which includes knowledge about the banking sector? What are the legal powers of the responsible institutions in the process of informing and educating the client in the banking sector in Kosovo? What are the steps to be taken by these institutions to intensify financial information and education in the country? How does information and financial education affect clients' protection in the banking sector?

ABOUT FINANCIAL EDUCATION

Education and information are different concepts, while education means a process of gaining knowledge and skills to understand and manage consumer resources and make relevant decisions, information concerns the data or information on products or services of specific nature. This information influences the client to buy a certain product or service. But both education and information are important components in consumer protection. In this regard, it will be discussed special education in a special field such as financial education. There are many definitions of financial education.

The level of culture and financial education of consumers and the public as a whole for years has attracted the attention of institutions in a growing number of countries. Financial development is critical to economic growth, but its micro-determinants are still not well understood. It should be borne in mind that financial education is not only for investors and that for the establishment of a more balanced development of a multifunctional financial system, but a good education of the population plays a key role. The literature argues that insufficient financial education poses a significant barrier to the demand for financial services: if individuals do not know or understand the products, they do not seek them. The importance of financial education has increased in recent years as a result of financial and demographic, economic market developments, and policy changes. Financial markets and especially banking products are becoming more sophisticated and new products are constantly being offered.

The first international initiative aimed at improving financial knowledge was developed by the Organization for Economic Cooperation and Development (OECD) as an intergovernmental project in 2003 to ensure the continuous improvement of financial education. However, the financial crisis of 2007-2009 can undoubtedly be considered as a turning point for more attention in financial education (Saeedi and Hamedi 2018). The influence of financial education, consumer protection, and financial inclusion is growing at the rate of technological advancement, as the economy as a whole and financial market are digitalizing and many clients are receiving digital financial services (OECD 2019). The integration of these three elements as essential components for the financial empowerment of individuals and the overall stability of the financial system has been globally recognized and endorsed by G20 leaders through a set of high-level principles: Innovative Financial Inclusion (2010); Financial Consumer Protection (2011); and National

Strategies for Financial Education (2012). Collectively, these four sets of principles provide an initial basis for developing the most targeted approaches and international guidelines in digital finance. Based on its global leadership in financial education issues, the OECD and its International Financial Education Network (OECD/INFE) are actively involved in developing policy research and guidance on the implications of digital financial services for education.

The Notion of Financial Education

Financial education is the process by which consumers/financial investors improve their understanding of financial products and concepts and, through objective information, guidance, and/or advice; the consumer develops the skills and confidence to become more aware of the risks, and financial opportunities to make informed choices, know where to seek help, and take other effective actions to improve his or her financial well-being, whereas:

- Information includes providing customers with facts, data, and specific knowledge to make them aware of financial opportunities, choices, and consequences;
- Instruction includes giving guidance ensuring that individuals gain knowledge and skills to understand financial terms and concepts, through the provision of training and guidance (OECD 2005).

Advice includes providing customer advice on general finance issues and products so that they can make the best use of the financial information and guidance they have received (OECD 2005). However, there is a difference between consumer protection and consumer education. So, although we often hear about the same issue, it should be noted that there are differences in nuances between these categories, but it can also be concluded that information, namely financial education, meets the opus of what is known as consumer protection and therefore, in that case, can say that financial education has a complementary role in consumer protection within the banking sector.

The most frequently used way to provide financial education is through publications. These publications come in a variety of forms, including brochures, magazines, handouts, newsletters, annual reports, direct mail, documents, letters, and disclosures. Another frequently used method is the internet, in the form of websites, web portals, and other internet services. Other methods used include counseling services, including helplines; public education campaigns and events, including presentations, lectures, conferences, symposia; and training courses and seminars and other channel types. The authors José Roa and Mejía (2018) emphasized that banks can play a major role in promoting financial knowledge through an integrated approach based on supply-side initiatives for financial inclusion. Moreover, since banks are

constantly developing new financial products and services for different customers, they are in a better position to train customers as they are constantly providing financial services. Financial literacy is not a single, but a step-by-step process. It begins in childhood and continues through a person's life to retirement. Instilling the idea about financial literacy in children is especially important because they will carry it for the rest of their lives. The result of the survey is very encouraging, and we want to do our part to make sure all children develop and strengthen their financial literacy skills (George).

Regarding retail banking, three prevalent phenomena underscore the importance of identifying and implementing strategic approaches to financial sustainability and literacy: first, ignorance of the existence of different forms of borrowing can potentially push consumers toward borrowing, e.g. High cost and other expensive forms of credit; second, lack of understanding of how to better manage income and savings to overcome low savings levels can potentially weigh on the families' capacity to deal with unforeseen events; and, thirdly, the rapid pace of digitalization of money and finances, along with the development of new products and services, requires continuing education to be fully understood (EBA 2020).

Consumer protection and financial education together can influence the improvement of efficiency, transparency, and access to financial markets by reducing information asymmetry. Consumer protection and financial education can support financial inclusion to encourage competition leading to lower costs but higher quality products, increasing consumer confidence and reducing risk when purchasing financial products and services because they already know that remedies exist when things do not go well (World Bank 2014). Financial literacy has been defined as the ability to process financial information and make informed decisions about personal finances" (IFMR 2008).

Commercial banks in Kosovo should also have the mission of financial education of their customers since - as stated by various researchers - only when the customer has deeper information and knowledge of banking products, they will ask for them, so this positive aspect should be seen by commercial banks that are in direct contact with the customer. Informing the customer is the first step that banks should maintain in their agenda. During the banking relations, in most cases, the customer doesn't understand the features of the banking products; especially the innovative products are not understandable for the elderly. As a result of not being informed, many customers revolt at the moment they realize that they have purchased an unnecessary product for which an extra fee must be paid.

WHY THE INFORMATION AND THE FINANCIAL EDUCATION ARE IMPORTANT?

During the financial crisis, both household investors and borrowers were confronted with unpleasant surprises. Individual investors learned that the financial products they bought were much riskier than they had perceived. Borrowers found themselves over in debt and unable to service their loans. How did this come about? Investors were looking for high-yield investments and banks began offering newly designed products with the promise of higher returns. In addition, many households were interested in more and higher loans to finance consumption, for example, and banks were often willing to grant them (CESifo DICE Report, 2011). Lack “of effective disclosure and deceptive advertising on the part of providers and failure to understand financial products on the part of consumers contributed to the collapse of the subprime mortgage market in the United States” (CGAP/WB 2010, 23).

The effects of insufficient financial education can be seen in consumer behaviors related to credit management (Lusardi 2008). Lack of knowledge of lending and lending process affects inadequate behavior in the form of obtaining an expensive loan (Swagler and Wheeler 1989, 145-160). A low level of financial education has resulted in a high level of consumer debt, low supply on deposit rate, and a record level of bankruptcies (Fox, Bartholomae, and Lee 2005, 195-214). The effects of low levels of financial knowledge can also manifest themselves in financial stress that extends beyond an individual's personal life (Joo and Garman 1998, 156-161).

At work, employees routinely experience stress from poor financial behaviors in their personal lives, which negatively affect their productivity at work (Garman, Leech, and Grable 1996). These negative personal financial effects are seen throughout the workplace and have negative financial and consequences for employers as well.

Employees use their working time to contact creditors, seek additional sources of credit, and talk to their associates and supervisors about financial problems (Garman 1997). The associated costs incurred by employers from these negative working time behaviors include lower productivity, increased absenteeism, frequent delays, increased risk accidents, increased health care costs for financial stress diseases, employee theft, and time lost in work dealing with personal finance matters, and increased employee turnover (Garman 1997).

For emerging economies, financially educated consumers can help ensure that the financial sector makes an effective contribution to real economic growth and poverty reduction. But financial knowledge is also essential for more developed economies, to help ensure consumers save enough to secure a sufficient retirement income while avoiding high levels of debt that can result in bankruptcy and exemptions. The consumer in Kosovo, classified as a developing economy, must acquire the basic knowledge of financial education not only in terms of economic growth but also to protect their rights as a consumer. But the problem lies in the perception that

consumers have about financial knowledge. Therefore, Kosovo must constantly increase the pace of activities in financial education so that the level of financial knowledge of consumers increases realistically and not according to public perceptions.

Financial literacy includes “knowledge and skills in personal finance planning, financial service selection, budgeting and investigation, credit management, consumer purchasing, consumer rights and obligations, and decision-making skills in every aspect of life as a consumer, worker and citizen” (Thomson 2007), while the financial education means “the ability to interpret, communicate, calculate, develop independent judgment, and take actions that result in that process to thrive in the complex world of finance” (Danes and Haberman 2007, 48-60).

There are responsible authorities in Kosovo that could initiate and at the same time raise the issue of financial education. As we will see in the continuation of this paper, I have identified responsible institutions which could do a great job in the field of financial education such as the Central Bank of the Republic of Kosovo (CBK), the Ministry of Trade and Industry (MTI) - Department of Consumer Protection, the Banking Association, and Consumer Protection Associations.

Weaknesses in consumer protection and financial literacy affect both developed and developing countries where Kosovo and the countries of the Western Balkans region are located. Developing countries around the world have seen rapid growth in their financial sectors over the past decade, and rapid revenue growth has provided consumers with more resources to invest. Increased competition between financial institutions, combined with improvements in financial techniques and information technology, resulted in public sales of highly complex financial products. The public in many emerging markets, however, does not have a history of using sophisticated financial products. For many first-time financial consumers, often no member of their extended family has entered into a long-term financial contract such as a home mortgage loan. Increasing financial education significantly affects investment growth (or access to credit), widening the gap between the complexity of financial products and the ability of consumers to understand what they are buying. Especially in low-income countries, technology is also changing the types of protection needed by many financial first-time consumers. When more than half of the population does not have a bank account, financial services delivered through mobile phones have met a critical need for consumers, but such services raise important issues of consumer disclosure, security, and education. Even in well-developed markets, however, poor consumer protection and financial literacy can make households vulnerable to unfair and abusive practices by their financial institutions, as well as financial fraud (Consumer Protection 2010, 8).

Today, everyone is facing an overwhelming number of complex financial decisions. However, many are unprepared to make informed financial choices as they move into adulthood. Various studies have indicated that students without financial education are more likely to have financial problems, like low credit scores and

significant debt in the future. For this reason, incorporating financial education in schools is more important than ever before. Moreover, financial education and information of the banking clients impact the improvement of financial consumer protection, which in the end will contribute to increased financial stability and a more stable economy within which the financial services environment may thrive and at the same time serves as a deterrent to those financial service providers who would want to exploit financial consumers through irresponsible and abusive practices. In addition, financial consumers will be confident to take part in the financial system.

A BRIEF OVERVIEW OF THE FINANCIAL EDUCATION IN SOME OF THE SOUTHEAST EUROPE COUNTRIES

Financial education is substantial for the financial safety and reliability of individuals, families, companies, and organizations. There are international and regional mechanisms on best practices of consumer protection in the financial sector. Through financial education, citizens enhance their knowledge of financial products, risks, and opportunities.

Consumer protection in general - but also financial education - is on the agenda of many countries in Southeast Europe, a region that has moved from a centralized economy to a market economy in the 90s of the last century. The countries of the region, more or less, are constantly trying to prove themselves in terms of advancing in various processes. Some of these are already the EU Member States and some others aspiring for future membership are conditioned to make legal and institutional reforms within the European integration agenda. In this regard, in the field of consumer protection, including banking consumer protection, different legal and institutional initiatives have been taken to comply with the EU Directives. However, the region remains - on the same level of consumer protection and the level of education and financial information indicate this.

Knowing about financial education is the first step towards taking any action ahead regarding this issue, so some studies are performed in the region to determine the level of financial education. Unfortunately, Kosovo is not included in a recent study on financial education conducted by the OECD, which in turn includes countries from the region that are not much different than ours. According to this research, knowledge about financial services and services reached a maximum point of 57%, which is a very low percentage compared to EU countries where the result is 64% to 65%. According to the OECD, the level of financial knowledge among consumers is low, including those in developed countries (Figure 1). Certainly, this level differs for different education and income levels, but data shows that consumers with higher education and income levels can be as unknowledgeable on financial matters as those with less education and lower income levels (OECD 2006).

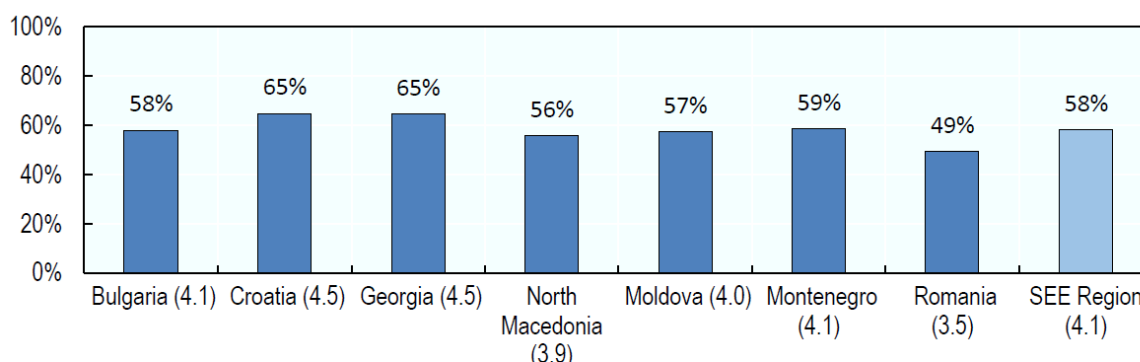


Figure 1: Financial literacy of adults in Southeast Europe
(Source: Financial Literacy of Adults in South East Europe 2020, 7)

With the level of literacy required not only by the financial service provider, but financial education and awareness should also be promoted by all relevant stakeholders, and clear information on consumer protection, rights, and responsibilities should be easily accessible by consumers. The provision of broad-based financial education and information to deepen consumer financial knowledge and capability should be promoted, especially for vulnerable groups (including younger people, illiterate groups, the elderly who do not understand innovative banking products, etc.). The average hides important heterogeneity between and within countries. Adults in Georgia and Croatia are relatively strong in terms of financial knowledge, both when compared to adults in other countries and compared to levels of consumer behavior and attitudes domestically. In Moldova, behavior and attitude scores are considerably higher than the knowledge score and also the highest across the region, helping make the Moldovan financial literacy score the highest in the region overall. Financial knowledge in Romania is low compared to the other countries in the sample, while adults in Bulgaria and North Macedonia exhibit almost identical strengths across all three components of financial literacy. The financial knowledge score of adults in Montenegro is relatively stronger than both their consumer behavior and attitude scores.

FINANCIAL EDUCATION AND INFORMATION IN THE EUROPEAN UNION

Education and information are also specified in Article 169 of the Treaty on the Functioning of the European Union (2012). Education is an independent field of the Member States, and the EU can only facilitate this process. At the European level, there is no specific directive on consumer education in general or financial consumers in particular, but the EU has adopted some directives which have important components of

financial education and consumer protection¹. The intensification in the adoption of directives has continued especially after the financial crisis of 2007-2009, paying great attention to consumer protection in financial products and services. Directives which have an impact on financial education and its protection are extremely important because they enable the consumer to obtain information, e.g. as the Consumer Credit Directive obliges financial institutions to provide all necessary information to the client from the pre-contractual stage in the format of Information Consumer Credit Standard which enables customers to compare prices.

The Payment Accounts Directive also obliges the Member States to support consumer education by providing consumer guidance and assistance in managing their finances², all of which are approved by the European Parliament as one of the institutions that play a key role in consumer protection, although it has limited competencies in the field of education. Also, the adoption of the 'Green Paper on Retail Financial Services' highlights the importance of financial education as a tool to protect and empower consumers.

The European Commission has approved 'Consumer Financial Services Action Plan: Better Products, More Choices' confirming that "this topic is very important all across EU" (European Commission 2017). Committed to European integration, the European Economic and Social Committee (EESC) contributes to strengthening the democratic legitimacy and effectiveness of the EU by enabling civil society organizations from the Member States to express those views at the European level. Over the years, EESC has proven to be active in the field of financial education and financial literacy, publishing, in particular, an opinion entitled 'Financial education and responsible consumption of financial products' and 'Financial education for all' (EESC Report 2017).

¹Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts; Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers; Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees; Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC; Directive 2005/29/EC of The European Parliament and of The Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC; Directive 2008/48/EC of the European Parliament and of The Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC; Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long term holiday product, resale and exchange contracts; Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests; Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

² Article 49, Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts.

Among the most important institutions that contribute to financial education within the EU and beyond is the European Banking Authority (EBA). The EBA founding regulation³ provides in Article 9 as part of its mandate on 'consumer protection and financial activities', that "the Authority will take a leading role in promoting market transparency, simplicity and fairness for products or consumer financial services throughout the internal market, including [...] reviewing and coordinating financial information and education, initiatives by the competent authorities". Article 31 and 31a gives the EBA a general coordination role between the competent authorities', which includes "facilitating the exchange of information between them (The Authority shall, together with the European Supervisory Authority, European Insurance, and Occupational Pensions Authority and with the European Supervisory Authority)" (European Securities and Markets Authority). The EBA constantly undertakes financial education activities that aim to help financial consumers improve their understanding of financial products, concepts, and risks through information, guidance, and objective advice as opportunities to make informed choices, to know where to go, and to help and take other effective actions to improve their financial well-being (EBA 2020, 16). In terms of financial literacy, European Union countries are among the world's best performers in financial literacy (Table 1). Denmark and Sweden both have 70% of the level of education. However, the EU also includes countries that perform below the global average, such as Romania at 22% and Portugal at a rate of 26%.

Table 1: Financial literacy around the world (Source: Bruegel Publication, 2018)

Country/region	Number of countries	Literacy Score
EU	28	50
Non-EU advanced (excl. US)	8	58
US	1	57
China	1	28
Asia (excl. China)	12	32
Africa	35	33
Commonwealth of Independent States (CIS)	12	30
Latin America & Caribbean	19	29

³Regulation (EU) No. 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision on No 716/2009/EC and repealing Commission Decision 2009/78/EC, OJ L 331, 15.12.2010, p. 12-47. Regulation amended by Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 PE/75/2019/REV/1 OJ L 334, 27.12.2019, p. 1–145.

FINANCIAL EDUCATION IN KOSOVO AND ITS ROLE IN CLIENT PROTECTION

In Kosovo, a generation ago most consumers had only two basic banking products: a current account and a savings account. Such accounts were easy to open and maintain. Now, however, consumers are faced with a different variety of bank accounts: flexible accounts, scheduled time deposit accounts, child accounts, joint accounts, and so on. Not to mention a wide range of other banking products and online services. This has increased the need for the banking client to get more information about the characteristics of the banking products they use. The development of banking technology such as the introduction of ATMs, online banking services, especially e-banking (internet banking service), or mobile banking (mobile banking), show that the advancement of banking technology is moving at a faster pace, faster than customer education or information about these services.

In general terms, consumer information and education are legal rights⁴ also specified in the Law on Consumer Protection (LCP). The law obliges the Ministry of Education (ME) to formulate curricula that are in function of consumer education in the educational system of Kosovo, while the Ministry of Trade and Industry (MTI) is obliged to assist the ME in formulating these curricula. At the same time, the law obliges MTI to cooperate closely with consumer protection associations to provide information and training in the field of consumer protection.

The Government of Kosovo has also approved the 'Consumer Protection Program 2016-2020' where consumer information and education are seen as a very important component in the institutional and legal journey of consumer protection⁵.

From the legal regulations, but also the approved documents like this program, it is not difficult to conclude that in Kosovo many legal and institutional instruments are engaged in consumer protection. Depending on the scope of action, regulatory and supervisory authorities have legal and institutional powers to protect consumers. When it comes to the banking customer, it is the Central Bank of the Republic of Kosovo (CBK) that has the legal authority to not only license financial institutions but to regulate and supervise them as well.

As an example, we can mention the Federal Reserve of the United States of America and its role in financial education. The Federal Reserve Board and Reserve Banks in the United States actively promote consumer education and financial awareness training. They collaborate with financial institutions and community groups to highlight the importance of financial education and to raise consumer awareness as well as local financial education opportunities. They also encourage research to find the most

⁴ Article 4, Consumer rights, Law No. 06 / L-034 on Consumer Protection, Official Gazette of the Republic of Kosovo No. 11/14 June 2018.

⁵ For more details, please see: *Consumer Protection Program 2016 – 2020*, Ministry of Trade and Industry, Prishtina, 2015, pp. 18-19.

effective approaches to educating the general public about financial issues and evaluating financial program education (Ferguson 2002). Following the legal authorizations, the CBK has approved the 'Financial Education Program' which aims to increase the level of financial knowledge to prompt the citizens to make the right decisions regarding financial products and services, savings, and investments. With the development of financial markets and the economic changes that occurred during recent years the importance of financial education also increased during the recent years. In this context, the Central Bank of the Republic of Kosovo has compiled a plan of financial education, which aims to increase the level of financial knowledge which will help the citizens in making more accurate decisions regarding financial services, savings and investment.

The CBK Financial Education Program aims to contribute to financial welfare through better information and financial education of the public and by promoting and maintaining a stable financial system in the country. Within this program, the CBK has promoted a corner on its website which is dedicated to financial education by providing basic information on simpler products that can be used by ordinary consumers such as: use of bank cards, saving money, as well as information that the consumer should know before getting a loan⁶.

The CBK has published a link⁷ on its website and constantly publishes educational materials in the form of brochures, videos, etc., but recently also books about financial education for primary school's pupils starting from first to fifth grade⁸. This is a very good initiative of the CBK that aims at financial education of the consumer, but the financial education program is not published by the CBK and thus we cannot make a more detailed analysis of what it contains or what it will have to contain the program in the form of suggestions. What can be seen from the publications on the website is that there is no cooperation or memorandum with banks and consumer protection associations as very important actors in the process of financial education of customers.

In the meantime, the Kosovo Banking Association (KBA) on its website also has a corner dedicated to financial education where are published some videos and materials related to the financial education campaign⁹. Furthermore, KBA has a bookstore and all interested parties can find interesting materials regarding banking and finance¹⁰.

Financial education in pre-university education is effective as it reaches out to adolescents who can learn about the concept of how to manage finances. Through education, the transfer of financial knowledge of parents-students is achieved, but an important mediator is precisely the educational institution-school. Thus, programs,

⁶ The CBK education materials: <https://bqk-kos.org/edu/wp-content/uploads/2020/04/Broshura-2-Final.pdf>

⁷ The CBK education corner: <https://bqk-kos.org/edu/en/>

⁸ The CBK books for financial education: <https://bqk-kos.org/edu/en/books/>

⁹ <https://www.bankassoc-kos.com/En/edukimi-financiar/>

¹⁰ The list of the books: <https://www.bankassoc-kos.com/En/literatura/>

seminars, activities through fairs stimulate financial behavior in young people. In this respect, both the CBK and the KBA have a tremendous impact on these workshops and seminars. In conclusion, financial education should be activated by key actors in the banking field such as commercial banks, the CBK, the KBA, and the financial education campaign should be intensified.

Special importance is given to consumer education in the Kosovo program for consumer protection. Consumer protection “means fair, complete and comprehensive, and adequate protection of consumer rights in the field of education, schooling, information, and other fields, and protection from different causes, influences, fraudulent activities, substances and complicated factors, which in the daily use by the consumer, have the potential to endanger consumer’s life, health, environment, and family”¹¹.

LEGAL OBLIGATIONS OF BANKS FOR INFORMING CUSTOMERS AS AN IMPORTANT COMPONENT IN FINANCIAL EDUCATION AND CUSTOMER PROTECTION IN THE BANKING SECTOR

The CBK as a regulatory authority has not adopted a decisive regulation regarding financial education, but in this respect, it has adopted two regulations with considerable weight in the field of consumer information. Regulation on the publication of information by banks aims to determine the information that banks should publish as well as the form, manner, and timelines of publication of information to increase the transparency of the banking sector. This regulation obliges all banks operating in Kosovo to publish information about risks, activities for which they are licensed, general information about the bank, information on the structure of shareholders, the structure of governing bodies, and their organizational structure.¹²

Publication of the financial situation through the publication of financial statements and products is undoubtedly important for customers because the customer has information about the banking entity before making a financial decision. This regulation also obliges banks not to disclose information that is considered confidential or confidential to their customers under applicable laws or regulations or other information which may affect their competitive position in its market. An important instrument in the field of information is the ‘Regulation on Effective Interest Rate and Disclosure Requirements’ which obliges commercial banks in Kosovo to disclose the Effective Interest Rate (EIR) concerning two basic products such as consumer credit and deposit. This regulation also obliges banks to provide complete information about products and banking services when signing banking contracts. Important components

¹¹ See: *Consumer Protection Program 2016 - 2020*, Ministry of Trade and Industry, Prishtina, 2015, p. 5

¹² See: Article 3, *Regulation on publication of information by banks*, CBK, Official Gazette of the Republic of Kosovo No. 11/11 May 2012.

of this regulation are the elements of the loan agreement and the deposit agreement (Figure 2). The regulation also has a mandatory space regarding price disclosure requirements, according to which all banks must publish the price lists and fees that are applied in writing on their premises and the website. But bankers do not always update their pricing on the websites for which they are required to do so and as we can see in the table below so are the quotes regarding disclosure with only one specific product.

Table 2: Information presented by Kosovo banks in individual loans pricelists (Source: GAP Institute, 2019)

Individual loans									
	Raiffeisen Bank	Procredit Bank	NLB	Teb Bank	BKT	Banka Ekonomike	BPB	Türkiye İş Bankası	Ziraat Bank
Amount	✓	✓	✓	✗	✓	✓	✓	✓	✗
Prepayment provision	✓	✗	✓	✓	✗**	✗	✗	✗	✗
Late payment interest	✓	✓	✓	✓	✓	✓	✓	✗	✗
Loan maintenance tariff	✓*	✗	✗	✗	✗	✗	✗	✗	✗
Maximum term	✓	✓	✓	✓	✓	✓	✓	✓	✗
Administrative costs	✓	✓	✓	✓	✓	✓	✓	✓	✓
Annual interest rate	✓	✓	✓	✓	✓	✓	✓	✓	✓
Monthly interest rate	✗	✗	✗	✓	✗	✗	✗	✗	✗
Effective interest rate	✓	✓	✓	✓	✓	✓	✓	✓	✗

* Applied only for overdrafts

** Presented only in loan agreements, but not pricelists


Financial education in Kosovo is not part of the school curriculum and consequently, the need for knowledge in the field of finance is great. Recent activities undertaken by the CBK and the Kosovo Banking Association (KBA) are a necessary effort to intensify financial and information-related educational activities. There is a lot of space for all institutions such as the CBK and the KBA but also for the other banks to intensify even more the educational and financial information activity. As economic experts point out, in addition to consumer protection, educating and informing customers has a positive impact on sustainable financial development, which is also a primary objective of the CBK.

CONCLUSION

It is universally recognized that financial education and information, together with a strong consumer protection framework, are vital to the empowerment of individuals and can contribute to the overall stability of the financial system, especially in a developing country. It is therefore valuable for policymakers to have priority about the levels of consumer financial inclusion along with a measure of their financial education (OECD/INFE 2020, 29), therefore, the following are some recommendations that should be undertaken by the CBK and other responsible institutions that have legal obligations in financial education and customer protection in the field of the banking sector in Kosovo.

At first, is informing the clients that the commercial banks should inform accordingly their customers regarding the features of the products/services they receive. Commercial banks should also inform their customers regarding every change in the prices, terms, interest rates, and all relevant applied changes. In the education process, the CBK needs to intensify measures regarding the publication of information and provision of information by commercial banks in Kosovo. This is easily achieved through the examination process which is already a regular process that the CBK undertakes against commercial banks.

Cooperation between the Central Bank of the Republic of Kosovo with the Ministry of Education in the area of financial education needs to be introduced as a subject in primary schools and thus in the institutional line to achieve a presence of financial education from the earliest age.

It can be concluded a very important need to create cooperation between the CBK, the KBA, and the commercial banks regarding the importance of financial education, and to organize workshops and raise the awareness of the banking staff regarding the information of the customers about the banking products and services and the importance of an informed consumer for the banking market. Commercial banks should publish on their website the link to the financial education website of the CBK and proclaim consumer education and information as of vital importance for the consumer himself. The CBK could organize quizzes to measure financial knowledge because so far, unfortunately, there is no measure in this regard (OECD in its publications related to financial education has not included Kosovo). 

REFERENCES

1. CESifo Dice Report (2011). *Financial Inclusion: Reforms in the areas of consumer protection and financial literacy*. Journal for Institutional Comparisons, Volume 9, Number 2.
2. *Central Bank of the Republic of Kosovo*. Education materials available at: <https://bqk-kos.org/edu/wp-content/uploads/2020/04/Broshura-2-Final.pdf>
3. *Central Bank of the Republic of Kosovo*. Education corner available at: <https://bqk-kos.org/edu/>
4. *Central Bank of the Republic of Kosovo*. Books for financial education, available at: <https://bqk-kos.org/edu/en/books/>
5. Danes, S. and Haberman H. (2007). Teen Financial Knowledge Self-Efficacy, and Behavior: A gender view. *Journal of Financial Counselling and Planning*, Vol. 8, Issue 2, available at: https://www.researchgate.net/publication/253732153_Teen_Financial_Knowledge_SelfEfficacy_and_Behavior_A_Gendered_View/link/541736340cf203f155ad5084/download
6. EBA (2020). Report on Financial Education 2019/2020, available at: https://www.eba.europa.eu/sites/default/documents/files/document_library/News%20and%20Press/Press%20Room/Press%20Releases/2020/EBA%20identifies%20trends%20and%20lessons%20learned%20in%20financial%20education%20and%20literacy%20initiatives%20in%20its%20second%20Financial%20Education%20Report/EBA%20Financial%20Education%20Report%202019-2020.pdf
7. European Commission (2017). Communication from the Commission. Consumer Financial Services Action Plan: Better Products, More Choice, Brussels.
8. Carl, George. Chair of the National Commission on Financial Education (CPA) - the mission of this institution is to advance national financial education in the US for more refer to the link: <https://www.aicpa.org/volunteer/financialliteracyresourcecenter/whatis360/mission.html>
9. Fox, J., Bartholomae, S., & Lee, J. (2005). Building the case for financial education. *The journal of Consumer Affairs*, 39(1).
10. Garman, E. T., Leech, I. E., & Grable, J. E. (1996). The negative impact of employee poor personal financial behaviors on employees. *Financial Counseling and Planning*, 7(15).
11. G20/OECD (2016). INFE REPORT HIGHLIGHTS Ensuring financial education and consumer protection for all in the digital age, available at: <https://www.gpfi.org/sites/gpfi/files/documents/HIGHLIGHTS-G20-OECD-INFE-Report-Financial-education-and-consumer-protection-in-the-digital-age.pdf>

12. Joo, S., & Garmin, E. (1998). Workers want more than retirement education at their workplace: A report of research findings. *Personal Finances and Worker Productivity*, 2(2).
13. *Kosovo Banking Association*. Financial Education and Library available at: <https://www.bankassoc-kos.com/En/edukimi-financiar/>
14. Saeedi, A and Hamed, M. (2018). *Financial Literacy, empowerment in the stock market*, Publishing AG part of Springer Nature.
15. *Law No. 06 / L-034 on Consumer Protection*, Official Gazette of the Republic of Kosovo No. 11/14 June 2018.
16. Lusardi, A. (2008). Household saving behavior: The role of financial literacy, information, and financial education programs (Working Paper No. 13824). Retrieved from National Bureau of Economic Research site: <http://www.nber.org/papers/w13824>
17. *Ministry of Trade and Industry* (2016). Consumer Protection Programme 2016-2020, available at: http://www.kryeministri-ks.net/repository/docs/CONSUMER_PROTECTION_PROGRAME.pdf
18. José Roa, M. & D. Mejía (2018). *Financial Decisions of Households and Financial Inclusion: Evidence for Latin America and the Caribbean*. Centro de Estudios Monetarios Latinoamericanos, Durango núm. 54, Colonia Roma Norte, Delegación Cuauhtémoc, 06700 Ciudad de México, México, available at: <https://scioteca.caf.com/bitstream/handle/123456789/1189/2016-jrp.pdf?sequence=1&isAllowed=y>
19. OECD (2005). *Improving Financial Literacy: Analysis of Issues and Policies*, OECD, available at: <https://www.oecd.org/south-east-europe/programme/Kosovo%20Albanian.pdf>
20. OECD (2017). *G20/OECD INFE Report on ensuring financial education and consumer protection for all in the digital age*, available at: <https://www.oecd.org/finance/financial-education/G20-OECD-INFE-Report-Financial-Education-Consumer-Protection-Digital-Age.pdf>
21. OECD (2019). *Effective Approaches for Financial Consumer Protection in the Digital Age*. FCP Principles 1, 2, 3, 4, 6 and 9, available at: https://www.oecd.org/finance/financial-education/Effective-Approaches-FCP-Principles_Digital_Environment.pdf
22. OECD (2019). *Effective Approaches For Financial Consumer Protection in the Digital Age*, available at: https://www.oecd.org/finance/financial-education/Effective-Approaches-FCP-Principles_Digital_Environment.pdf
23. Swagler, R. & Wheeler, P. (1989). *Rental-purchase agreements: A preliminary investigation of consumer attitudes and behaviors*. *Journal of Consumer Affairs*, 23(1), 145-160.

24. Thomson, Gale (2007). *Encyclopedia of Business and Finance*, 2nd. ed. Copyright 2007 Detroit, Mich.: Macmillan Reference USA.
25. WB - *Consumer Protection and Financial Literacy Lessons from Nine Country Studies*, Europe and Central Asia Region Finance and Private Sector Department June 2010.
26. WB (2014). *Global Survey on Consumer Protection and Financial Literacy: Oversight Frameworks and Practices in 114 economies*, available at:
<https://openknowledge.Worldbank.org/bitstream/handle/10986/18978/887730WP0v20P10port0CPFL0Box385258B.pdf?sequence=1&isAllod=y>